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Robert Plotkin

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REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS

*A REPORT BY THE WASHINGTON COUNCIL OF LAWYERS**

PREFACE

This Report reviews the performance of the Justice Department's Civil Rights Division since President Reagan's inauguration. The Division is the Civil Rights backbone of the federal government, and its activities and policies set the pace not only for other federal departments, but also for state, local and private agencies.

The Report reviews at length the activities of the Division's sub-units, which are called "Sections." Each Section has primary responsibility for the enforcement of particular civil rights laws. The Division's Appellate Section is the only section not individually reviewed but its influence on policies is noted in connection with discussions of particular cases.

The report was prepared over a ten month period by eleven volunteer attorneys of differing backgrounds and experience. They have done extensive legal research, reviewed public documents, court filings and official Department of Justice statements. They have also interviewed present and past Civil Rights Division attorneys and have met with a variety of knowledgeable people in the civil rights field.

We have made every attempt to keep this Report accurate and current. But, as is often the case when a volunteer group attempts to monitor a governmental agency, there may well be errors of omission. For these we apologize in advance.

*This report was originally issued in September, 1982 as WASHINGTON COUNCIL OF LAWYERS, REAGAN CIVIL RIGHTS: THE FIRST TWENTY MONTHS, and is reprinted here in abridged form. The Washington Council of Lawyers is a voluntary, bipartisan bar association that has sought, since its creation in 1971, to promote public service and public interest activities within the legal community. Its membership includes representatives from private law firms, public interest groups, and governmental agencies.

On behalf of the Washington Council of Lawyers, our sincere thanks to all those people who worked so long and hard to issue this Report.

Robert Plotkin Chair

INTRODUCTION

Soon after becoming Attorney General, William French Smith promised minority and women's groups that the Justice Department would continue to enforce vigorously the federal civil rights laws. Although he warned that the Administration would change the focus of past civil rights policies, it would, he said, develop creative new approaches to resolve the problems of discrimination.¹

Despite these assurances, civil rights advocates remained concerned. To head the Civil Rights Division, the Attorney General selected William Bradford Reynolds, a private practitioner from Washington, D.C. who readily admitted that he had no background or expertise in the field. Subsequent appointments throughout the Department and its Civil Rights Division failed to include anyone with a civil rights background, nor were any members of a racial minority appointed to positions of authority. The public statements made by Administration spokesmen concerning civil rights matters were few and far between, but those that were issued contained ominous warnings about the new President's commitment to enforcing federal civil rights law.

This Report was undertaken to evaluate that effort. Twenty months into the Reagan Administration, a review of the Civil Rights Division's activities confirms that the Attorney General's early promise to vigorously enforce the law has not been fulfilled.

The Civil Rights Division has long been the centerpiece of federal civil rights commitment. It is the barometer by which all federal agencies' activities can be measured. Indeed, the Division is officially charged with coordinating and reviewing all the civil rights policies and regulations of most federal departments. This Report concludes that the Administration has retreated from well-established, bipartisan civil rights policies that were devel-

1. Remarks of Attorney General William French Smith before the American Law Institute at 9-10 (May 22, 1981).

oped during both Democratic and Republican Administrations. At the same time, the Reagan Administration has failed to develop—and implement—cohesive and consistent civil rights policies, despite its promise to devise creative and innovative solutions to age-old problems. As a result, the Division's line attorneys have been relegated to the position of a contemporary army entering sophisticated combat with antiquated weaponry and technology.

I. THE GENERAL LITIGATION SECTION: FAIR HOUSING AND EQUAL EDUCATIONAL OPPORTUNITY

The largest, and perhaps most influential, of the Civil Rights Division's litigating sections is the General Litigation Section. Its thirty-seven lawyers have the major responsibility for litigating discrimination cases in the areas of housing, education and credit. It assumed its present form in 1978, when the former Housing and Credit Section merged with the existing Education Section. It is this Section that is the public focus of the Reagan Administration's efforts to alter the enforcement of civil rights laws.

A. *Fair Housing*

1. Introduction: The Continuing Problem of Housing Discrimination

The Fair Housing Act of 1968 declared it a national policy "to provide, within constitutional limitations, for fair housing throughout the United States."² Despite this promise of national commitment, the reality of racial discrimination in housing persists. For example, a 1979 study by the U.S. Department of Housing and Urban Development (HUD) found that the probability of a black homeseeker encountering at least one instance of discrimination in his search for housing is 75% in the rental market and 48% in the sales market.³

2. 42 U.S.C. § 3601 (1976).

3. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, MEASURING RACIAL DISCRIMINATION IN AMERICAN HOUSING MARKETS: THE HOUSING MARKETS PRACTICES SURVEY ES-2 (1979). A similar HUD study of discrimination against Mexican-Americans in the Dallas rental housing market determined that light-skinned Mexican-Americans were subject to a 65% chance of discrimi-

This continued racial discrimination in housing has serious consequences. Experts have estimated that housing discrimination is a major cause of the increasingly segregated living patterns which dominate our urban areas today.⁴ Largely as a result of discrimination, not simply differences in income, blacks are almost twice as likely as the general population to live in sub-standard housing, and receive an average of 30% less value for their housing dollar.⁵ Segregated and inferior housing for minorities helps produce segregated and inferior education, employment, and municipal services in an increasingly vicious cycle.⁶ Despite the promise of fair housing legislation, segregation and discrimination in housing remain unsolved.

2. Fair Housing Laws and the Role of the Justice Department

The principal weapon in the fight against housing discrimination, and the primary enforcement tool of the Justice Department, is Title VIII of the 1968 Civil Rights Act, also known as the Fair Housing Act of 1968.⁷ The Act prohibits discrimination with respect to a wide range of practices, including not only refusals to sell or rent, but also discrimination in financing, brokerage services, advertising, the terms, conditions, and privileges

nation while dark-skinned Mexican-Americans had a 96% chance of experiencing discrimination in seeking rental housing. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, *DISCRIMINATION AGAINST CHICANOS IN THE DALLAS RENTAL HOUSING MARKET: AN EXPERIMENTAL EXTENSION OF THE HOUSING MARKET PRACTICES SURVEY* (1979). See also Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 CATH. U. L. REV. 363, 374-79 (1981) [hereinafter cited as Lamb]; Hecht, *Apartment Hunting in Black and White*, N.Y. Times, May 11, 1978, at A23, col. 6.

4. See, e.g., Muth, *Residential Segregation and Discrimination*, in PATTERNS OF RACIAL DISCRIMINATION 107, 112, 113 (G. von Furstenberg, B. Harrison & A. Horowitz eds. 1974) [hereinafter cited as PATTERNS]; Lamb, *supra* note 3, at 376-78.

5. See, e.g., Lamb, *supra* note 3 at 388-89; Quigley, *Racial Discrimination in the Housing Consumption of Black Households*, in PATTERNS, *supra* note 4, at 121, 122-25, 133.

6. See, e.g., Lamb, *supra* note 3, at 390-95; U.S. COMMISSION ON CIVIL RIGHTS, *EQUAL OPPORTUNITY IN SUBURBIA* 9-15 (1974).

7. 42 U.S.C. §§ 3601-3619, 3631 (1976 & Supp. V 1981). Several other laws and constitutional provisions prohibit discrimination related to housing and have been utilized by the Justice Department, such as the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1976 & Supp. V 1981), but most federal fair-housing activity has been focused on Title VIII. See U.S. COMMISSION ON CIVIL RIGHTS, *THE FEDERAL FAIR HOUSING ENFORCEMENT EFFORT* 57-60 (1979) [hereinafter cited as 1979 CRC REPORT].

of sale, and the provision of related services and facilities.⁸ Public as well as private discrimination is banned, and Title VIII also bars exclusionary land use controls that discriminate on racial grounds.⁹

The Justice Department is the only federal agency empowered to bring enforcement actions under Title VIII.¹⁰ An action for injunctive relief may be brought whenever there is a "reasonable cause to believe" that a person is engaged in "a pattern or practice" of discrimination or such discrimination "raises an issue of general public importance."¹¹ The Department may exercise its authority on the basis of information provided by aggrieved individuals or on the basis of its own independent investigations. Because of its exclusive federal Title VIII enforcement responsibility, the role of the Justice Department is critical to achieving fair housing.

3. Civil Rights Division Fair Housing Efforts Prior to the Reagan Administration

Under both Republican and Democratic administrations, the Civil Rights Division has played an important role in fighting housing discrimination. Between 1969 and mid-1978, the Civil Rights Division brought more than 300 cases against over 800 defendants, averaging approximately 32 cases per year.¹² In addition, 36 enforcement proceedings (*e.g.*, for civil contempt or supplemental relief) were filed.¹³ Even this quantity of litigation

8. 42 U.S.C. §§ 3604-3606 (1976).

9. See 42 U.S.C. § 3615 (1976); *see, e.g.*, *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975); *Morales v. Raines*, 486 F.2d 880 (7th Cir. 1973).

10. HUD has the statutory responsibility to receive and investigate complaints of housing discrimination, but only has the power to conciliate disputes, not to bring enforcement actions. See generally H.R. REP. NO. 96-865, 96th Cong., 2d Sess. (1980); REPORT OF THE COMPTROLLER GENERAL, STRONGER FEDERAL ENFORCEMENT NEEDED TO UPHOLD FAIR HOUSING LAWS (1978). Private actions may be brought under Title VIII as well.

11. 42 U.S.C. § 3613 (1976).

12. *Fair Housing Amendments Act of 1979: Hearings on H.R. 2540 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 3 (1979) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Department of Justice). See 1979 CRC REPORT, *supra* note 7, at 70-71, 73.

13. *Id.*

has been characterized, by the U.S. Commission on Civil Rights, as "somewhat disappointing" in light of the magnitude of the housing discrimination problem.¹⁴

However, both the Commission and fair housing advocates have praised the "high quality" of the Division's housing discrimination efforts prior to the Reagan Administration, both in its pre-suit investigations and in its actual litigation.¹⁵

Perhaps the most notable achievement of the Division has been its contribution to the development of a body of case law which has enhanced the effectiveness of Title VIII. For instance, *United States v. City of Black Jack*¹⁶ was one of the first appellate court decisions to apply to housing cases the "effects" test or "*prima facie*" concept recognized in employment discrimination cases. The court in that case adopted the Justice Department's position that conduct by a defendant (in that case passage of a zoning ordinance prohibiting the construction of any new multiple-family dwellings) which has a discriminatory effect establishes a *prima facie* case of discrimination and shifts the burden of proof to the defendant to justify the ordinance's racially discriminatory impact. Virtually every other federal appellate court has followed *Black Jack* and has held that the *prima facie* case concept is proper under Title VIII.¹⁷ The "effects" test was utilized by the Division itself in *United States v. City of Parma*¹⁸ as one basis for obtaining a significant court order against the exclusionary actions of an Ohio suburb. The relief included the creation of a fair housing committee within city government and a requirement that the city seek additional subsidized housing for low and moderate income families.

14. 1979 CRC REPORT, *supra* note 7, at 71. The Commission cited several factors which limited the litigation effort: the small size of the housing section, the strict internal standards for filing suit, and the section's multi-level internal review process. *Id.* at 72-73. These factors, coupled with the Division's decision to concentrate on more complex cases with more wide-ranging impact in such areas as exclusionary zoning, resulted in a decrease in the average number of cases filed each year in the 1978-80 period to 19. See 1979 ATT'Y GEN. ANN. REP. 114; 1980 ATT'Y GEN. ANN. REP. 129.

15. 1979 CRC REPORT, *supra* note 7, at 70.

16. 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

17. See, e.g., *Robinson v. Twelve Lofts Realty, Inc.*, 610 F.2d 1032, 1038 (2d Cir. 1979); *Resident Advisory v. Rizzo*, 564 F.2d 126, 146-48 (3d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

18. 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd in part*, 661 F.2d 562 (6th Cir. 1981).

Other important principles established in Division housing cases include:

(1) A duty by defendants found liable in discrimination cases to take affirmative steps to correct the effects of their past discrimination;¹⁹

(2) The right of the United States to sue several defendants operating in the same geographic area as part of a group pattern or practice even where no defendant had individually engaged in a pattern and practice and even though the defendants had not acted in concert;²⁰

(3) The vicarious liability of principals for discriminatory acts of their agents;²¹ and

(4) The liability of newspapers for printing discriminatory advertisements.²²

The performance of the Civil Rights Division in the housing discrimination area has been characterized as "impressive."²³ The Division's success in building a legal foundation for successful attacks on housing discrimination has earned it bipartisan praise for making a "significant contribution" to fair housing.²⁴

4. The Civil Rights Division Under the Reagan Administration

Both fair housing advocates and career Justice Department attorneys are in agreement that fair housing enforcement by the Civil Rights Division under the Reagan Administration has deteriorated dramatically. This change is most evident in three areas: new litigation activity, shifts in policy, and conduct of previously-filed litigation.

19. *United States v. West Peachtree Tenth Corp.*, 437 F.2d 221 (5th Cir. 1971).

20. *United States v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973).

21. *United States v. Reddoch*, 1 E.O.H.C. (P-H) § 13,569 (S.D. Ala. 1972), *aff'd*, 467 F.2d 897 (5th Cir. 1972).

22. *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934 (1972).

23. U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT* 57 (1971) [hereinafter cited as 1971 CRC REPORT].

24. *Id.* at 71.

a. *New Litigation Activity*

New fair housing litigation activity under the Reagan Administration has come to a virtual standstill. Compared to an annual average of nineteen new cases in 1978-80 and over thirty-two new cases in the predominantly Republican years of 1969-78, only two new fair housing cases have been brought by the Division since 1980.²⁵ No cases whatsoever were filed until February, 1982, more than a year after President Reagan took office.²⁶

Moreover, the two cases finally brought by the Section represent a significant departure from its previous strategy to concentrate on complex "test" cases. Both cases involve "distinctly minor suits against individual property management companies,"²⁷ which were already being sued by local housing groups in virtually identical suits.²⁸

The Division has claimed that the amicus curiae brief it filed in the Supreme Court in a housing case, *Havens Realty Corp. v. Coleman*,²⁹ in which the Court affirmed the standing of "testers" to sue under Title VIII, evidences its continued support for fair housing. But the facts behind the filing of the brief belie that claim. In fact, the brief was filed *not* at the initiative of the Division, but "only at the insistence" of HUD and despite the opposition of the Assistant Attorney General William Bradford Reynolds.³⁰ Although Mr. Reynolds has frequently claimed in public that many new housing cases are "under investigation," present and former Division attorneys have reported that this may mean nothing more than the opening of a new file when a citizen's complaint is received.

25. Washington Post, Feb. 13, 1982, at E3, col. 1.

26. Washington Post, April 3, 1982, at A15, col. 3 (letter from Martin E. Sloane, Executive Director of the National Committee Against Discrimination in Housing) [hereinafter cited as Sloane Letter].

27. Sloane Letter, *supra* note 26.

28. Compare *Fair Housing Center v. Hartman and Tyner, Inc.*, No. 8173272 (E.D. Mich., September 8, 1981) with *United States v. Hartman and Tyner, Inc.*, No. 8271066 (E.D. Mich., March 25 1982); compare also *Education/Instruction v. Commonwealth Avenue Associates, C.A. No. 81-208-MA* (D. Mass. Jan. 29, 1981) with *United States v. Commonwealth Avenue Associates, C.A. No. 82-302-MA* (February 4, 1982).

29. 455 U.S. 363 (1982).

30. Sloane Letter, *supra* note 26.

b. *Policy Changes*

According to present and former Division attorneys, including the former Chief of the General Litigation Section, Robert Reinstein, the decline in new Division litigation activity is due largely to shifts in Division policy. For example, despite previous Division practice and judicial precedent supporting Title VIII as a remedy against exclusionary zoning and similar practices which have significant discriminatory effects, Assistant Attorney General Reynolds has announced that the Division will no longer institute such actions.³¹

Perhaps even more important, the Division has also abandoned the "effects" test, which the Division itself helped to establish. The courts have recognized that Congress' intent in enacting laws against discrimination in employment, housing, and other areas was to combat the "consequences" of discrimination, "not simply the motivation"; as the courts have explained, even discrimination not caused by blatant prejudice "can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."³² In addition, both courts and civil rights advocates have emphasized the importance of the "effects" concept in proving discrimination; as the court succinctly observed in the *Black Jack* case, "clever men may easily conceal their motivations" in discrimination cases.³³ Yet the Division's leaders have apparently forgotten that "sophisticated as well as simple-minded modes of discrimination" are illegal.³⁴ Top Division officials have criticized the "effects" test,³⁵ and Division attorneys have been told that no new cases employing that concept will be initiated.

c. *Conduct of Pending Litigation*

These policy shifts have also affected the Division's conduct of pending cases. For example, in a case against the City of Yon-

31. National Law Journal, Nov. 9, 1981, at 3, col. 1.

32. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (employment). See also *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396, 404 (N.D. Ill. 1971).

33. *United States v. City of Black Jack*, 508 F.2d 1179, 1185 (8th Cir. 1974) cert. denied, 422 U.S. 1042 (1975).

34. *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

35. See, e.g., Memorandum from Robert J. D'Agostino to William Bradford Reynolds (July 21, 1981), reprinted at 127 CONG. REC. H6183 (daily ed. Sept. 14, 1981).

kers, challenging segregation in education and housing in New York, the Division has already amended its complaint to eliminate its request that Yonkers remedy affirmatively its previous housing discrimination, despite the fact that the Division itself has helped to establish the principle that such relief may be required.

In addition, Division attorneys report that they have been instructed not to attempt to utilize the "effects" test in any pending litigation, and that references to discriminatory effect are often deleted from briefs and pleadings by the Division superiors. For example, the Division recently told the court in *United States v. City of Birmingham*³⁶ that its case was based on discriminatory intent and that it was not employing the "effects" test, despite its recognition that the federal courts of appeal have upheld this approach.³⁷ This shift in position contributed last year to the first defeat the Division has ever sustained in a Title VIII case against a municipality.³⁸

d. Conclusion

Until 1981, both Republican and Democratic administrations had joined in the battle against housing discrimination. Under the Reagan Administration, however, the Civil Rights Division has refused to use the very legal doctrines which the Division itself has helped establish, and instead has virtually abandoned the fight. To date, the Division has proposed no credible alternatives to the theories it has discarded. Whatever its intent, the effect of this policy can only be to exacerbate discrimination in housing across the country.

B. School Desegregation and Equal Educational Opportunity

Historically, the Civil Rights Division's greatest impact has come in its efforts to achieve equal opportunity and desegregation in public education. Since 1964, when Congress first authorized the Attorney General to commence such litigation, the Division has been the single most influential federal agency in

36. No. 80-70991 (E.D. Mich 1982).

37. See also New York Times, Dec. 20, 1981, § 4, at 4, col. 2 (discussing the Yonkers litigation).

38. See *Angell v. Zinsser*, 473 F. Supp. 488 (D. Conn. 1981).

matters of desegregation. It has provided the resources and personnel to expand desegregation efforts beyond urban areas in the deep South. It has also forced a succession of Presidents to commit themselves to full equality in education, and it has actively involved the entire executive branch in the desegregation process.

1. The Civil Rights Division Under the Reagan Administration:
"Enforcing" the Law of Desegregation

a. *Reinterpreting School Desegregation Law*

At the very heart of the Supreme Court's decision in *Brown v. Board of Education*³⁹ is the Court's emphatic pronouncement that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."⁴⁰ Yet perhaps the most alarming example of the Civil Rights Division's changes in policy under the Reagan Administration is its emerging view that "separate but equal" schooling, illegal for a generation, has again become acceptable.

Assistant Attorney General Reynolds has announced that the Division's "future enforcement policies will be aimed" not at eliminating segregation by all permissible means, but at remedying "substantial disparities in the tangible components of education" between minority and white students.⁴¹ In other words, the Division's primary goal is to make minority schools "equal" to white schools even if they remain "separate"—precisely the concept rejected by the Supreme Court in *Brown*.

The leadership of the Division has also sought to narrowly redefine what constitutes illegal discrimination. According to the current Civil Rights Division, "in every case where *de jure* segregation is established, we will insist on the removal of all official

39. 347 U.S. 483 (1954).

40. *Id.* at 495.

41. *Hearings on School Desegregation Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 619-20 (1981) (testimony of William Bradford Reynolds) [hereinafter cited as Reynolds Testimony]. See also Summary of Oral Argument by Solicitor General Lee in *Crawford v. Board of Education*, 102 S. Ct. 3211 (1982), at 50 U.S.L.W. 3778 (suggesting such measures as increasing teacher-student ratios and spending more funds as alternatives to court-ordered desegregation busing plans).

impediments to desegregation."⁴² The key words in that sentence are *de jure* (in law) and "removal" of "official impediments." Contemporary school boards seeking to segregate thirty years after *Brown* will hardly announce their intentions in a public law or pronouncement. Moreover, the Division's policy has little application today in areas where decades of school discrimination have created an entrenched pattern of segregation that "cannot be undone with the stroke of a pen."⁴³ Instead, as the Supreme Court has emphasized, "affirmative action" is necessary in order to "achieve the greatest possible degree of actual desegregation" practicable where segregation has taken place.⁴⁴ The Division's policy of simply "removing" official obstacles to desegregation might have been meaningful in 1955, when many states still had statutes prohibiting integrated schools. Today it is empty rhetoric.

b. Failure to Investigate or File New Cases

Since the Reagan Administration took office in January 1981, the Civil Rights Division has not filed a single desegregation suit. Moreover, Justice Department attorneys claim that the enforcement situation is even worse than the lack of court filings would indicate.⁴⁵ Investigation initiatives have been negligible; no enforcement priorities have been set, and investigations that were ongoing or nearing completion have received, at best, minimal support.⁴⁶

42. DEPT. OF JUSTICE, THE CIVIL RIGHTS POLICY OF THE DEPARTMENT OF JUSTICE: A RESPONSE TO THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS 18 (April 1982) (emphasis in original) [hereinafter cited as LEADERSHIP CONFERENCE RESPONSE].

43. H.R. REP. NO. 12, 97th Cong., 2d Sess. 22 (1982) [hereinafter cited as H.R. REP. NO. 12].

44. *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 28, 26 (1971). *Accord*, e.g., *Davis v. School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971).

45. Wines, *Administration Says It Merely Seeks A "Better Way" To Enforce Civil Rights*, 1982 NAT'L J. 536, 539 [hereinafter cited as Wines]. See also Reynolds Testimony, *supra* note 41, at 624:

At the moment I guess I have been in office about 3 ½ months, and . . . [w]e certainly do not have any suits, and we do not really have a full-blown investigation. This is the preliminary stage of, one, development, and, two, looking over different school areas to see what would be appropriate, which area it would be appropriate to move forward in.

Id.

46. H.R. REP. NO. 12, *supra* note 43, at 3, 25.

Equally disturbing has been the Department's failure to pursue cases that are fully developed and poised for prosecution.⁴⁷ For example, just before leaving office, former Attorney General Civiletti wrote a memorandum to the new Attorney General stating that he was prepared to file suit against more than twenty suburban school districts in the St. Louis area, but that he felt the case needed the support of the new administration.⁴⁸ The Division has since failed to take any such action.

Furthermore, the Division has refused to appeal cases, despite an arguable likelihood of success, in which the courts have ruled against positions advocated during the previous administrations. In Houston, the Division has abandoned its earlier efforts to seek a metropolitan desegregation remedy, following dismissal of its case at the district court level.⁴⁹

The Department's "hands-off" policy is also reflected in its willingness to settle cases with minimal compromise on the part of the school systems.⁵⁰ A related symptom is the Division's indifference to violations of existing court orders.⁵¹

The long-run implications of the Department's negligible enforcement efforts are alarming. As the Civil Rights Division refrains from filing any new cases and systematically settles those which are pending, it will soon be left with little or no case load, and a major force in desegregation will have been effectively eliminated. Ultimately, the "non-enforcement" policy amounts to a simple declaration that the problem has disappeared and therefore nothing further needs to be done. In so concluding, the Division is either ignoring reality or completely surrendering to anti-desegregation forces. "[T]he Civil Rights Division now has become a negative force, providing solace to those who have violated and will continue to violate among the most important laws of this nation."⁵²

47. See H.R. REP. No. 12, *supra* note 43, at 25.

48. See Washington Post, June 4, 1981, at A2, col. 1.

49. See Letter from U.S. Commission on Human Rights to President Reagan 9 (Feb. 12, 1982); Memorandum & Order, *Ross v. Houston Indep. School Dist.*, Civ. Action No. 10444 (S.D. Tex. June 17, 1981); *on remand from Houston Ind. School District v. Ross*, 282 F.2d 95 (5th Cir.), *cert. denied*, 364 U.S. 803 (1960); N.Y. Times, Aug. 28, 1981, at A10, col. 2.

50. See Wines, *supra* note 45, at 539.

51. See, e.g., N.Y. Times, Feb. 14, 1982, at 35, col. 1.

52. H.R. REP. No. 12, *supra* note 43, at 25.

c. *Refusal to Seek Effective Remedies*

The leadership of the Division has sought to characterize the dispute between itself and its critics as a simple disagreement over what remedies should be pursued in school desegregation cases, not over basic questions of "enforcement of civil rights."⁵³ As the Supreme Court ruled almost a century ago, however, to eliminate all effective remedies for the enforcement of a right is "to take away the right itself."⁵⁴ The record reveals that this is precisely the course on which the Division has embarked in five specific areas. The areas are: repudiation of mandatory student reassignment plans, reliance upon purely voluntary efforts, refusal to seek system-wide remedies, disavowal of the affirmative duty to desegregate, and refusal to follow court standards for desegregation in higher education.

i. *Repudiation of Mandatory Reassignment Plans as a Remedy to Achieve Desegregation*

Of primary concern, is the Justice Department's wholesale abandonment of the use of mandatory student reassignment plans and "busing" as a legitimate and effective tool to implement desegregation. Despite the Department's consistent position to the contrary over the last two decades, both Mr. Reynolds and Attorney General Smith have announced unequivocally their repudiation of this remedy under all circumstances.

The Department's anti-busing policy flies in the face of Supreme Court rulings that "[a]n absolute prohibition against use of [reassignment plans]—even as a starting point—contravenes the implicit command of *Green v. County School Board* . . . that all reasonable methods be available to formulate an effective remedy."⁵⁵ Indeed, the Court has recognized for segregated schools in many cases that "it is unlikely that a truly effective remedy could be devised *without* continued reliance upon [busing]."⁵⁶ As the Supreme Court cautioned in *Swann v. Charlotte-*

53. LEADERSHIP CONFERENCE RESPONSE, *supra* note 42, at 22 (emphasis in original).

54. *Poindexter v. Greenhow*, 114 U.S. 270, 303 (1885).

55. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971).

56. See also H.R. REP. NO. 12, *supra* note 43, at 19 (concluding that "busing achieves a degree of desegregation that is unattainable through other means").

Mecklenberg Board of Education,⁵⁷ “[d]esegregation plans cannot be limited to the walk-in school.” Apparently, the Assistant Attorney General has attempted to do precisely that.

The Department’s opposition to busing demonstrates wholesale reversal by the Division leadership of the positions previously advanced by both Republican and Democratic administrations, often in the very cases at issue, and a serious retreat in civil rights enforcement.

ii. Reliance Upon Purely Voluntary Programs

Another persistent theme of the current Civil Rights Division is the notion that any progress toward desegregation may be conducted only on a purely voluntary basis. Mr. Reynolds has testified, “I don’t think . . . that the Government can compel an integrated education. . . . [W]e are not going to compel children who do not want to choose to have integrated education to have one.”⁵⁸ This statement captures the essence of the Department’s policy, and indicates how far it has moved from the *Brown* principles.

Such a policy is utterly devoid of support in the law. The Supreme Court has never left any doubt that desegregation is constitutionally mandated.⁵⁹ This mandate cannot be satisfied by offering children and their parents the “option” of choosing an integrated education, as Reynolds has proposed.⁶⁰ As the Court stated in *Green v. County School Board*, “the burden on a school board today is to come forward with a plan that promises to work realistically now . . . [I]f there are reasonably available other ways . . . promising speedier and more effective conversion to a unitary, non-racial system, ‘freedom of choice’ must be held unacceptable.”⁶¹

Moreover, the Department’s eagerness to embrace “voluntary” programs as an acceptable alternative to busing appears either hopelessly naive or subtly disingenuous. A generation of experience with desegregation efforts and experiments has demonstrated fairly conclusively that voluntary or optional

57. 402 U.S. 1, 30 (1971).

58. Reynolds Testimony, *supra* note 41, at 631.

59. *Brown v. Board of Education*, 347 U.S. 483 (1954).

60. Reynolds Testimony, *supra* note 41, at 631-32.

61. 391 U.S. 430, 439, 441 (1968).

transfer programs are simply ineffective in promoting any significant degree of desegregation.⁶² The Supreme Court itself has commented that "the general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation."⁶³ The Division has demonstrated a readiness to place its faith in voluntary compliance programs despite long histories of such programs' failure.

iii. Refusal to Seek System-Wide Remedies

Another critical area in which the current Administration has repudiated long-standing Supreme Court precedent and Division practice is the Department's refusal to seek implementation of desegregation programs on a district-wide basis. The Supreme Court in *Keyes v. School District No. 1*⁶⁴ laid down a presumption that if a substantial portion of a particular school district is shown to be impermissibly segregated, a system-wide remedy must be imposed encompassing all schools within that district. In other words, the government need not prove that each individual school is intentionally segregated.

The Assistant Attorney General has announced that he will refuse to abide by the Supreme Court's ruling in *Keyes*. "In deciding to initiate litigation, we will not rely on the *Keyes* presumption, but will define the violation precisely and seek to limit the remedy only to those schools in which racial imbalance is the product of intentionally segregative acts of State officials."⁶⁵ Although Mr. Reynolds has conceded that *Keyes* creates an automatically triggered presumption,⁶⁶ he has also attempted to argue that *Keyes* does not really mandate such a presumption, but merely offers the presumption as an option that the Justice Department may choose to exercise if it desires.⁶⁷ Apparently, Mr. Reynolds believes that the Supreme Court's holding in *Keyes* is "unfair,"⁶⁸ and therefore he refuses to abide by it.⁶⁹

62. See H.R. REP. No. 12, *supra* note 43, at 19, 21-22.

63. 391 U.S. at 440.

64. 413 U.S. 189 (1973).

65. Reynolds Testimony, *supra* note 41, at 618.

66. *Id.* at 617, 622.

67. See *id.* at 622.

68. *Id.* at 615.

69. See generally LEADERSHIP CONFERENCE ON CIVIL RIGHTS, WITHOUT JUSTICE (Feb.

This shift in policy has more than theoretical importance. By seeking relief in only part of a school system where segregation has occurred, the Division will encourage residential instability and "white flight" as parents seek to transfer their children to schools unaffected by desegregation. In addition, meaningful desegregation may often be impossible if only a fraction of a school district is involved. The Division's new policy, therefore, can lead only to unstable and ineffective attempts at desegregation which the Division's own leadership has decried.⁷⁰

iv. Disavowal of the Affirmative Duty by School Boards to Dismantle Dual Systems

It is now well established that school board officials have an affirmative constitutional obligation to act promptly to "eradicate the effects" of past unlawful segregation.⁷¹ The school district must ensure that student assignment policies do not have the effect of perpetuating or reestablishing a segregated system.⁷² In discharging this "affirmative duty," school boards must employ "whatever steps might be necessary" to eradicate discrimination.⁷³ "Conscientious efforts"⁷⁴ are not enough; contrary to the Department's assertions,⁷⁵ the Supreme Court has held that compliance will be measured according to the *effectiveness* of the programs, not simply the degree of good intentions.⁷⁶ School districts guilty of unlawful segregation must take affirmative steps to achieve the "greatest possible degree of actual desegregation."⁷⁷

Nevertheless, Justice Department officials have disavowed the existence of any such affirmative duty. Assistant Attorney General Reynolds has suggested that school officials have no obligation to provide desegregated schools for all students. His

1982) [hereinafter cited as LEADERSHIP CONFERENCE REPORT]. This obvious repudiation of the law was criticized in the LEADERSHIP CONFERENCE REPORT, but the issue was not addressed by the Justice Department in its April 3, 1982 response to the REPORT.

70. See H.R. REP. No. 12, *supra* note 43, at 24.

71. Dayton Board of Education v. Brinkman (II), 443 U.S. 526, 537 (1979).

72. Columbus Board of Education v. Penick, 443 U.S. 449, 460 (1979).

73. Green v. County School Board, 391 U.S. 439, 437, 440 (1968).

74. LEADERSHIP CONFERENCE RESPONSE, *supra* note 42, at 14.

75. *Id.* at 12.

76. Dayton Board of Education v. Brinkman (II), 443 U.S. at 538.

77. *Davis*, 402 U.S. at 37.

view is that they are merely required to refrain from hindering whatever degree of integration might naturally occur on its own.⁷⁸ But this approach impermissibly shifts to parents and children the responsibility for initiating desegregation, a duty which the Supreme Court has held rests "squarely on the School Board."⁷⁹

v. Refusal to Follow Court-Ordered Standards for Higher Education Segregation

The Division's refusal to seek effective remedies for past state-imposed segregation is aptly illustrated by its higher education cases. The Division has taken the position that a large degree of segregation in state higher education systems is tolerable, as long as certain steps are taken to equalize the quality of the schools.⁸⁰ While upgrading the quality of traditionally underfunded schools is certainly important, the problem is that, in the higher education context, "equalization" combined with an open admissions policy often has the effect of perpetuating and reinforcing existing segregation,⁸¹ a result that is just as illegal as segregation at the pre-college level under *Brown*. "Where an open admissions policy neither produces the required desegregation nor promises realistically to do so, something further is required."⁸²

Pursuant to a 1977 court order in *Adams v. Califano*,⁸³ the Department of Health, Education and Welfare adopted a number of criteria for determining the acceptability of higher education desegregation plans. These requirements include specific steps to integrate students, faculty, and staff, and to eliminate unnecessary program duplication as between black and white schools (analogous to the magnet school concept).⁸⁴ The existence of program duplication leaves students with no incentive

78. Reynolds Testimony, *supra* note 41, at 631-34.

79. *Green v. County School Board*, 391 U.S. 430, 441-42 (1968).

80. See LEADERSHIP CONFERENCE REPORT, *supra* note 69, at 26.

81. See generally U.S. COMMISSION ON CIVIL RIGHTS, *THE BLACK/WHITE COLLEGES: DISMANTLING THE DUAL SYSTEM OF HIGHER EDUCATION* (April 1981).

82. *Geier v. University of Tennessee*, 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

83. 430 F. Supp. 119 (D.D.C. 1977).

84. See 43 Fed. Reg. 6658 (1978).

to cross traditional racial barriers, and therefore deprives schools of the ability to attract an integrated student body.

However, the current Civil Rights Division has refused even to abide by the minimal standards required by the court order in *Adams*. In Louisiana and North Carolina, for example, where major efforts had been underway to dismantle dual systems of higher education, the Justice Department and the Department of Education have now reversed their positions and have dropped the pending suits. The Department has agreed to require that traditionally black institutions be upgraded, but in the process, has allowed a substantial increase in the degree of program duplication, thus ultimately perpetuating and reinforcing the status quo. Indeed, the United States Commission on Civil Rights and the NAACP Legal Defense Fund have charged that these settlements violate the *Adams* criteria.⁸⁵ In response, the Justice Department has argued that the standards are merely flexible guidelines, which the Department may choose not to follow, and that the standards are inapplicable once settlement discussions have begun.⁸⁶ But the Department's interpretation completely undermines the purpose of the *Adams* criteria—to articulate standards so that those affected would have notice of their rights and responsibilities.⁸⁷ If the Department may choose selectively whether or not to enforce the standards, states will abandon further compliance efforts as they perceive the increasing likelihood that noncompliance will be tolerated.

Furthermore, the Department's novel "settlement" exception to the *Adams* requirements is an unheard of legal position likely to be transported to other areas. In effect, says the Division, a state may circumvent desegregation standards entirely by simply refusing to desegregate until the Division is forced to file suit, and then settling on its own terms. Such a policy signals a further retreat from effective civil rights enforcement.

85. See Letter from U.S. Commission on Civil Rights to President Reagan 7 (Feb. 12, 1982); *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983).

86. See Brief for Appellee at 31-36, *Adams v. Bell*, 711 F.2d 161 (D.C. Cir. 1983).

87. See *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

d. *Reinstatement of Tax Exemptions for Discriminatory Private Schools*

Finally, the Department has repudiated yet another long-standing legal position by its sudden willingness to extend tax exempt "charitable" status to racially discriminatory private schools. Although the Internal Revenue Service allowed segregated private schools to claim tax deductions prior to 1970, the Supreme Court in 1971 affirmed the issuance of a permanent injunction prohibiting the IRS from continuing such a policy.⁸⁸ While the injunction itself applied only to Mississippi, the IRS had already formally extended the non-discrimination policy to all schools, requiring proof that programs and facilities are operated in a non-discriminatory manner before a school may be deemed "charitable" under § 501(c)(3) of the Internal Revenue Code.⁸⁹

The Reagan Administration, however, has jettisoned this legal position in the wake of a challenge by two schools that had been denied tax exemptions by the IRS.⁹⁰ After the Fourth Circuit upheld the statutory and constitutional authority behind the IRS rulings, and the Supreme Court had granted certiorari to review the cases, the Justice Department reversed its position and urged the Supreme Court to drop the cases, because the administration had decided to allow the segregated schools to be tax exempt,⁹¹ despite the government's own characterization of the schools as "blatantly discriminatory."⁹² For example, though Bob Jones University has admitted black students since 1975, the school prohibits interracial mixing or dating.⁹³

The Department's reversal is not only without legal justifi-

88. *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub. nom. Coit v. Green* 404 U.S. 997 (1971) (per curiam).

89. *See Bob Jones Univ. v. United States*, 639 F.2d 147, 150 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2017 (1983).

90. *See Bob Jones University v. United States*, 639 F.2d 147 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983); *Goldsboro Christian Schools, Inc. v. United States*, 436 F. Supp. 1314 (E.D.N.C. 1977), *aff'd mem.*, 644 F.2d 879 (4th Cir. 1981), *aff'd*, 103 S. Ct. 2017 (1983).

91. The D.C. Circuit has temporarily enjoined the IRS and the Treasury Department from restoring the tax exemptions. *Wright v. Regan*, 49 A.F.T.R.2d (P-H) 82-757 (D.C. Cir. 1982); *see* 656 F.2d 820 (D.C. Cir. 1981), *cert. granted*, 103 S. Ct. 3109 (1983).

92. *See Washington Post*, Jan. 9, 1982, at A1, col. 1.

93. 639 F.2d at 149.

cation, but it also raises "serious constitutional questions,"⁹⁴ as it would have the effect of providing substantial economic benefits from the government to large numbers of discriminatory and segregated schools. As a matter of statutory interpretation, the racial policies of the schools in question preclude them from qualifying as "charitable" under the Internal Revenue Code because they stand in violation of "clearly defined public policy."⁹⁵ Neither the Free Exercise Clause nor the Establishment Clause of the First Amendment confers on discriminatory schools a right to tax exemptions. The government's compelling interest in eliminating all forms of racial discrimination, whether "governmental or private, absolute or conditional, contractual or associational," outweighs any additional burden on the schools resulting from a denial of tax-exempt status.⁹⁶ Indeed, the Establishment Clause prohibits government subsidization of racist religious beliefs by means of tax exemptions.⁹⁷

In reversing its position, the Department rejected the statutory basis for the Fourth Circuit holding, and ignored the Supreme Court's decision in the *Green* case. The about-face was apparently engineered by Mr. Reynolds despite doubts elsewhere within the Administration regarding the propriety and legal basis for his position. Ultimately, the White House was caught in an embarrassing series of inconsistent explanations about the change in policy, further revealing the fundamentally political nature of the decision.⁹⁸

II. THE VOTING SECTION—VOTING RIGHTS

A. Introduction

The Voting Section of the Civil Rights Division is responsible for enforcing the Voting Rights Act of 1965.⁹⁹ Pursuant to its obligations under Section 5 of the Voting Rights Act, the Voting

94. *Green v. Connally*, 330 F. Supp. at 1164.

95. *Bob Jones University v. United States*, 639 F.2d 147, 151 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983); *Green v. Connally*, 330 F. Supp. at 1156-60.

96. *Bob Jones University v. United States*, 639 F.2d 147, 153 (4th Cir. 1980), *aff'd*, 103 S. Ct. 2017 (1983).

97. *See id.* at 152 n.7.

98. *See generally* Washington Post, Feb. 3, 1982, at A1, col. 4; Washington Post, Feb. 2, 1982, at A1, col. 4.

99. 42 U.S.C.A. §§ 1971-1973bb-1 (1976 & Supp. V 1981).

Section analyzes requests by covered jurisdictions for preclearance of state and local election-related practices or procedures. Where revisions in election practices or procedures could undercut minority voter participation or dilute minority voting strength, the Voting Section recommends that the Attorney General object to such changes. The Voting Section also seeks to enforce the Voting Rights Act by participating as an *amicus curiae* in private litigation under the Act and by filing vote dilution cases as a party plaintiff.

During the 97th Congress, an extension of the Voting Rights Act was considered and eventually enacted into law. In the debate before Congress, the Administration's initial position, as represented by Attorney General Smith and Assistant Attorney General Reynolds, was opposed by every interested civil rights group.

On the enforcement front, the Voting Section has continued to review, and has objected to, several preclearance filings pursuant to Section 5 of the Act. However, Justice Department participation as an *amicus curiae* in private Voting Rights Act litigation has declined, and the Department has changed its position or discontinued participation as an *amicus* in several important cases. No vote dilution cases have been filed.

B. The Debate Over the Voting Rights Act Extension

In enacting the Voting Rights Act of 1965, Congress was fully aware that its previous efforts to ensure the protection and enforcement of the voting rights of minorities had been ineffective, and that "through unrelenting and ingenious defiance of the Constitution" several states had deprived blacks of the franchise.¹⁰⁰ Congress recognized that absent determined federal participation, the Fifteenth Amendment's guarantees against discrimination in voting would not be enforced.¹⁰¹ Accordingly, the Voting Rights Act of 1965 established broad prohibitions against voting discrimination, abolished various tests and qualifications for voting and, most important, created novel and sophisticated mechanisms for enforcement of the Act by the De-

100. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

101. *Id.* See also Christopher, *The Constitutionality of the Voting Rights Act of 1965*, 18 STAN. L. REV. 1, 1-9 (1965).

partment of Justice and private parties.¹⁰² The "extraordinary" enforcement mechanisms adopted by Congress, which are temporary and apply only to jurisdictions with a history of discrimination in voting,¹⁰³ were necessitated by the covered states' attempts to evade the Fifteenth Amendment's prohibition against discrimination in voting.¹⁰⁴

1. The Voting Rights Act of 1965

The Voting Rights Act of 1965 has been hailed as one of the most important civil rights bills ever enacted by Congress. Like previous voting rights legislation, the 1965 Act broadly prohibits discrimination in voting and abolishes all discriminatory tests and devices.¹⁰⁵ The difference between the 1965 Act and its predecessors is in the former's structure and enforcement. The Act incorporates a novel mechanism to enforce the broad prohibitions on voting discrimination: section 5 requires jurisdictions with a history of voting discrimination to "pre-clear" with the Justice Department all changes in election laws.¹⁰⁶

The Act includes three major provisions. First, section 2 of the Act prohibits the imposition of any practice, procedure, or test which has the effect of denying or abridging the right of any citizen to vote on account of race, color, or membership in a language minority group.¹⁰⁷ Congress specifically abolished the use of any "test or device" in voting.¹⁰⁸ The term "test or device" includes literacy tests, educational requirements, "good character" tests, and, in jurisdictions where a language minority group comprises more than 50% of the voting age population, registration procedures or elections conducted solely in the English

102. *Id.* at 9-15.

103. 42 U.S.C. § 1973c (1976).

104. See Christopher, *supra* note 101, at 1-9; Derfner, *Racial Discrimination and the Right to Vote*, 27 VAND. L. REV. 523 (1973) [hereinafter cited as Derfner]; Roman, *Section 5 of the Voting Rights Act: The Formation of the Extraordinary Federal Remedy*, 22 AM. U. L. REV. 111, 125 (1972).

105. 42 U.S.C.A. §§ 1973-1973bb-1 (1976 & Supp. V 1981).

106. 42 U.S.C. § 1973c (1976). See LAUGHLIN, *VOTING RIGHTS IN THE SOUTH: TEN YEARS OF LITIGATION CHALLENGING CONTINUING DISCRIMINATION AGAINST MINORITIES* 16 (1982) [hereinafter cited as LAUGHLIN].

107. 42 U.S.C. § 1973 (1976).

108. *Id.* at § 1973a(a).

language.¹⁰⁹

Second, in connection with jurisdictions where voting discrimination had been flagrant, section 5 of the Act establishes temporary, extraordinary remedies without any need for prior adjudication.¹¹⁰ The states of Alaska, Alabama, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and Virginia are covered by section 5, as are counties or towns in thirteen other states.¹¹¹ These jurisdictions are prohibited from adopting any change in their election laws without obtaining the prior approval of the Attorney General or the United States District Court for the District of Columbia.¹¹²

Third, the Act permits the Attorney General to send federal examiners and observers to certain jurisdictions to protect the right to vote.¹¹³

On two occasions before 1982, in 1970 and 1975, Congress examined the progress made under the 1965 Act and extended it. Those extensions brought additional jurisdictions under the Act's special provisions and extended these provisions until August of 1982.¹¹⁴

Although no one would dispute that substantial gains in minority voting have occurred as a result of the 1965 Act and its amendments, the evidence demonstrates that a wide disparity between minority group registration and white registration still

109. *Id.*

110. 42 U.S.C. § 1973c (1976). *See* *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966).

111. 28 C.F.R. § 51 (Appendix) (1983). *See* LAUGHLIN, *supra* note 106, at 16.

112. 42 U.S.C. § 1973c (1976).

113. 42 U.S.C. §§ 1973d, 1973f (1976 & Supp. V 1981).

114. The 1970 amendments brought within coverage of the Act until August 1975, counties in New York, Wyoming, California, Alaska, and Arizona, and towns in Connecticut, New Hampshire, Maine, and Massachusetts. The 1975 amendments extended the Act for seven years, made permanent the nationwide ban on literacy tests and other devices, and extended coverage of the Act to protect language minority citizens from disenfranchisement. Additional jurisdictions subject to preclearance of election changes affecting language and other minority citizens as a result of the 1975 amendments included the states of Alaska, Arizona, and Texas, counties in California, Colorado, Florida, North Carolina, South Dakota, and townships in Michigan. Where discrimination in voting against language minority citizens was less severe, Congress required that language assistance be provided in the electoral process. Jurisdictions affected by this requirement included all 143 counties in Texas, all 32 counties in New Mexico, all 14 counties in Arizona, 39 counties in California, 34 in Colorado, and 25 in Oklahoma.

exists.¹¹⁵ Thus, the Voting Rights Act, facing an August 1982 expiration date, was the first civil rights issue to confront the Reagan Administration when it took office. Its response was less than comforting to civil rights proponents.

2. The 1982 Extension

During the House Judiciary Committee's consideration of the Act's extension, the Administration refrained from taking any position on the legislation. Although Justice Department representatives were invited to testify, no one representing the Administration appeared during any of the Committee's eighteen days of hearings.¹¹⁶

On October 5, 1981, the House passed H.R. 3112, by a vote of 389 to 24. H.R. 3112 extended the Voting Rights Act with two major amendments. The first was a change in section 2 of the Act to clarify that proof of discriminatory purpose or intent is not required in lawsuits brought under that section.¹¹⁷ The second amendment involved a series of changes to section 4(a), which permits covered jurisdictions to apply for removal from the Act's provisions.

The amendment to section 2 was intended to clarify the Congressional intent that effects, not motives, were the key fac-

115. Prior to 1965, the percentage of black registered voters in covered states was 29% while white registration was 73%. Today, black registration has increased so that in many covered states it stands near 50%; Hispanic registration in Texas has increased by two-thirds. However, white registration continues to outpace minority registration. Further, the number of minority elected officials remains a fraction of the total number of elected officials. See generally HOUSE JUDICIARY COMM., REPORT ON THE VOTING RIGHTS ACT EXTENSION, H.R. REP. NO. 227, 97th Cong., 1st Sess. 7-11 (1981); U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS (1981).

116. See generally LEADERSHIP CONFERENCE REPORT, *supra* note 69. Chapter 4 of the LEADERSHIP CONFERENCE REPORT states that the Justice Department declined to testify before the Committee because it was preparing an analysis for the President.

117. Section 2 of H.R. 3112 provides:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.

H.R. 3112, 97th Cong., 1st Sess. (1981).

tors.¹¹⁸ It was this proposal that was seized upon by opponents of the Act.

Throughout the debate before the Judiciary Committee and the House itself, these opponents argued that a "results" or "effects" test, rather than an "intent" test, would for some reason create a right to proportional representation as a remedy, *i.e.*, that a minority must be represented in elective offices in proportion to its numbers in the voting community. Both the language of section 2 in H.R. 3112 and the House Report address that concern in clear language:

The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself, constitute a violation of the section although such proof, along with other objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.¹¹⁹

When the Senate began to consider the Voting Rights Act, the Administration finally took a position. Despite the clear language of the House Report, the Administration opposed changes in section 2 and favored a simple ten-year extension of the Act.¹²⁰ In arguing against the House-passed version of section 2, Attorney General Smith claimed that a "results" or "effects" test would cause years of extended litigation whenever election results, redistricting and reapportionment plans "fail to mirror the population makeup in a particular community. . . ."¹²¹

118. H.R. REP. NO. 227, 97th Cong., 1st Sess. 29-30 (1981).

119. *Id.* See also *supra* note 117 for Section 2 language in H.R. 3112.

120. The Administration also supported amending the criteria of H.R. 3112 to ease covered jurisdictions' ability to be removed from coverage under the Act. However, as the debate over the Voting Rights Act extension evolved, the Administration focused on section 2, rather than the removal provisions. This chapter thus has the same focus, although it is important to note that the Administration did seek to weaken the removal criteria provisions by permitting removals based on a showing that a jurisdiction was in full compliance with the Act for a period of less than ten years, the time period for compliance included in H.R. 3117.

121. *Bills to Amend the Voting Rights Act of 1965: Hearings on S53, S1761, S1992 and H.E. 3112 Before the Subcomm. on the Constitution of the Senate Comm. of the Judiciary, 97th Cong., 2d Sess. 66 (1982)* (testimony of Attorney General William French Smith).

The Administration also took its campaign to the press. In "Op-Ed" pieces printed in the New York Times and the Washington Post, the Attorney General criticized the House bill as "a hastily devised smokescreen" for a drastic change in the law that would "compel reorganization of electoral systems to guarantee" proportional representation.¹²²

The Administration's position, which it urged on the Senate and the press, was that a simple, ten-year extension of the Act was all that was necessary to continue to implement the goals of the original 1965 Act. The Senate Subcommittee agreed with the Administration, and adopted a simple, ten-year extension of the Act on March 24, 1982.

At the full Committee, however, the controversy over section 2 continued. Finally, a bipartisan compromise was fashioned: the purpose of the House amendment would be incorporated into a bill acceptable to a majority of the Senate Judiciary Committee, but specific language would be added to section 2 itself to clarify that there was not established a right to proportional representation. On May 4, 1982, the full Judiciary Committee adopted S. 1992, with an amendment offered by Senator Dole containing the section 2 compromise. Despite the clear language of the House-passed version—which did not include a right to proportionate representation—the Administration continued to characterize the "liberal [House] version" as "incorporating the highly offensive concept of proportional representation based on race."¹²³ The Administration's characterization gave credibility to a false interpretation of the House bill and, until the Dole compromise, threatened to undo the substantial progress that has resulted from the Voting Rights Act.

Here, as in other disputed civil rights issues, the Reagan Administration attempted to mollify its critics on the pretense that it was engaged in a principled legal dispute. All it really accomplished, of course, was to obtain a bill that was, for all intents and purposes, not substantively different than the "liberal" House version. It took them seventeen months to achieve a routine and common legislative compromise: making explicit

122. Washington Post, March 29, 1982, at A11, col. 1; N.Y. Times, March 27, 1982, at A23, col. 2.

123. Reynolds, *Letter to the Editor*, Washington Post, May 31, 1982, at A16, col. 3.

that which was already implicit. Given that no one was advocating "proportionate representation," this delay raises questions about the Administration's own "intent."

C. *Enforcement of the Voting Rights Act*

In defense of the Justice Department's enforcement record of the Voting Rights Act, Assistant Attorney General Reynolds has claimed that the Voting Rights Section has "reviewed more than 8,400 electoral changes" and "participated in litigation in twenty-seven court cases seeking to assure minority voting rights" and that "the level of activity in the Division in the past year far exceeds previous years."¹²⁴ Reynolds' assertions were repeated in the Justice Department's response to the Leadership Conference Report, with the additional claim that "the level of the Department's activity in reviewing and challenging redistricting plans in 1981 is without precedent."¹²⁵ These claims are clearly impressive and paint a picture of the Justice Department vigorously and effectively protecting the voting rights of minorities.

However, upon closer examination, a different picture emerges, primarily because the facts cited by the Civil Rights Division are highly misleading though technically accurate. For instance, only two of the twenty-seven cases in which the Division has "participated" were initiated during this Administration. In addition, in several cases initiated by the previous administration, the Reagan Administration has remained active in the case, but has changed its legal position. Thus, in a case involving the electoral process in Lockhart, Texas which was decided in favor of the United States during the Carter Administration, on appeal to the Supreme Court the present Administration has filed a brief supporting the views of the dissenting judge, and urging that the judgment be vacated.¹²⁶ In other cases the Justice Department's "participation" is as *defendant* in declaratory judgment actions brought by state or local jurisdictions seeking approval of their plans. In still others it is

124. Speech of Assistant Attorney General Reynolds to the Delaware Bar Association, February 22, 1982 at 6-7.

125. LEADERSHIP CONFERENCE RESPONSE, *supra* note 42, at 40.

126. Brief for the United States at 7, *City of Lockhart v. United States*, 103 S. Ct. 998 (1983).

as an *amicus curiae* in lawsuits brought by private plaintiffs. Further, the two cases initiated by this Administration were routine section 5 enforcement actions in Louisville, Mississippi and Sumter County, Alabama. The Department has not yet filed any "major" (e.g. vote dilution) cases.

By contrast, in its first year in office the previous administration filed several section 5 enforcement actions and defended several other cases. It also *initiated* lawsuits challenging as unconstitutional the following practices: at-large elections systems (Uvalde, Texas), multi-member election systems for school boards (East Baton Rouge Parish, Louisiana), mis-apportionment of aldermanic wards (Kosciusko, Mississippi), and problems in voter registration at predominantly black colleges (Waller County, Texas). In addition, it participated as intervenors or as *amici* in other cases challenging practices such as: at large system for electing selectmen (West Point, Mississippi), at-large elections for the Parish Council (Plaquemines Parish, Louisiana), misapportionment of parish districts (Winn Parish, Louisiana), minority language voter registration problems (San Francisco, California), at-large elections under a commission form of government (Shreveport, Louisiana and Mobile, Alabama), and at-large elections for city commissioners (Albany, Georgia). The difference in the level and quality of activity is startling.

Mr. Reynolds' claim that the Justice Department has "reviewed" over 8,400 electoral changes is similarly misleading. The courts have interpreted section 5 to *require* submission to the Justice Department of changes which alter the election laws "in even a minor way" to give section 5 the "broadest possible scope."¹²⁷ In previous years, changes submitted to the Justice Department ranged from 2,078 in 1975 to 7,472 in 1976 to 7,340 in 1980.¹²⁸ Most significant, the 1980 Census has necessitated large scale redistricting and other electoral changes due to population growth and flux. Thus, the figures cited by Mr. Reynolds merely indicate an increase in the numbers of submissions to the

127. *Allen v. State Board of Education*, 393 U.S. 544 (1969). See generally McCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107, 110-14 (1979).

128. U.S. COMMISSION ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: UNFULFILLED GOALS*, at 66, Table 6.1 (September 1981).

Justice Department. "Review" by the Justice Department, though crucial under section 5, is an obligatory and involuntary act. It reflects no policy decision or activity initiated by the Division.

The claims concerning the number of objections to redistricting plans are more difficult to evaluate. Interestingly, the Division's objections have been to redistricting plans drawn up by Democratic controlled state legislatures in Texas, Virginia, North Carolina, South Carolina, Georgia, Arizona, Alabama and New York City. Thus, although minority groups clearly benefit from the objections, the potential benefit to the Republican Party cannot be ignored. For instance, in connection with the North Carolina congressional redistricting plan, Republican State Senator Cary D. Allred objected successfully to Justice Department approval of the plan, in part on the grounds that the proposed plan "minimizes the influence of the Republican Party in Alamance County because there are no effective Republican Organizations in most of the other counties of the Second District of the ratified plan of 1981."¹²⁹ The Civil Rights Division nevertheless denies charges of "political intervention."

Equally disturbing are those areas in which the Section has not been active. It has filed but two relatively minor cases in eighteen months, and has failed to file a single major case dealing with the pressing problems of "vote dilution." Although there exist notorious examples of covered jurisdictions failing to submit section 5 preclearance requests, the Division has made no attempt to undertake an affirmative identification or enforcement program, imposing the burden on private parties to enforce voting rights.¹³⁰ And, although it claims to be inundated with preclearance requests, there has been no significant increase in the Section's strength, nor do its budgetary requests reflect much future expansion.¹³¹

Thus, as in the other Sections, the day to day business of enforcing the Voting Rights Act seems to go on. But the agenda is filled mostly by old litigation and mandatory section 5 reviews. There is no new activity and little appears on the horizon.

129. Letter from Cary A. Allred to the Dept. of Justice (August 5, 1981).

130. U.S. COMMISSION ON CIVIL RIGHTS, *FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983*, at 35 (June 1982).

131. *Id.*

The Section has simply not carried out the bipartisan commitment to vigorous enforcement of voting rights which has characterized its own past activities.

III. THE SPECIAL LITIGATION SECTION—RIGHTS OF INSTITUTIONALIZED AND HANDICAPPED PERSONS

A. Introduction

America's penal, mental health, and juvenile institutions are rife with abuse of their populations.¹³² Recognizing the helplessness of inmates to correct institutional misconduct on their own, all the administrations during the past decade have encouraged the Civil Rights Division to address the most flagrant infringements of their Constitutional rights. Congressional hearings from 1978-80 documented continuing pervasive violations, an American horror story that resulted in the passage of the Civil Rights of Institutionalized Persons Act in 1980.¹³³

It would be whimsical to believe that in the short time since the Act's passage the problems it addressed have dissipated. Indeed, several months after its enactment, the Comptroller General of the United States issued a report finding that "unsafe, unsanitary conditions in many state prisons and local jails endanger the health and well-being of inmates, correctional staff, and visitors"¹³⁴ and that "the Department of Justice could offer

132. See, e.g., Friedman, *Rights of the Mentally Handicapped: Which Way in the 1980's?*, 17 TRIAL 42, 46 (Feb. 1981); U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: WOMEN IN PRISON: INEQUITABLE TREATMENT REQUIRES ACTION (GAO Dec. 10, 1980); U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: JAIL INMATES' MENTAL HEALTH CARE NEGLECTED: STATE AND FEDERAL ATTENTION NEEDED (GAO Nov. 17, 1980); U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: THE DEPARTMENT OF JUSTICE CAN DO MORE TO IMPROVE CONDITIONS AT STATE AND LOCAL CORRECTIONAL FACILITIES (GAO Sept. 15, 1980); Press, *The Scandalous U.S. Jails*, NEWSWEEK, Aug. 18, 1980, at 74-77a.

133. See, e.g., *Civil Rights of Institutionalized Persons, Hearings on H.R. 10 before Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (February 14, 1979); *Civil Rights of Institutionalized Persons, Hearings on S. 1393 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. (June 17-22, 1977); *Civil Rights of Institutionalized Persons, Hearing on H.R. 2439 and H.R. the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. (April 29, 1977).

134. U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: THE DEPARTMENT OF JUSTICE CAN DO MORE TO HELP IMPROVE CONDITIONS AT STATE AND LOCAL CORRECTIONAL FACILITIES i (GAO Sept. 15, 1980).

more assistance.”¹³⁵ Nevertheless, some eighteen months later, in a speech before the National Conference of Governors, Assistant Attorney General William Bradford Reynolds stated: “Rarely does one find today the kind of blatant, inhumane brutalization of inmates that stands out like a constitutional red flag to even the most casual observer.”¹³⁶

Within weeks of Mr. Reynolds’ speech, a federal district court in Indiana issued a preliminary order restraining state prison officials from continuing a practice of shackling celled inmates nude to their beds.¹³⁷ Simultaneously, defendants in Texas¹³⁸ and Alabama¹³⁹ were actively seeking to undo court orders issued for non-compliance with constitutional standards previously imposed.

Mr. Reynolds has criticized the courts in institutional cases as “overly intrusive in ordering relief, mandating detailed requirements to be followed by the states.”¹⁴⁰ Two weeks before the State of Texas renewed its efforts to scale down reforms ordered in the most significant prison litigation in which the Department is now involved,¹⁴¹ Mr. Reynolds announced a policy of leaving “many of the details to the states.”¹⁴²

As is also true in the school segregation and employment discrimination areas, Mr. Reynolds has minimized the scope of the problems in modern institutions. By so doing, it becomes simple to justify reduced levels of activity and attention. Mr. Reynolds’ public statements, and the informal policies and bureaucratic controls he has instituted, have chilled the aggressiveness of the Special Litigation Section’s staff.

135. *Id.* at ii-iii. See U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: WOMEN IN PRISON: INEQUITABLE TREATMENT REQUIRES ACTION (GAO Dec. 10, 1980); U.S. COMPTROLLER GENERAL, REPORT TO THE CONGRESS: JAIL INMATES’ MENTAL HEALTH CARE NEGLECTED; STATE AND FEDERAL ATTENTION NEEDED (GAO Sept. 15, 1980).

136. W. Reynolds, Remarks Before National Governors Conference 1 (Feb. 21, 1982).

137. *French v. Owens*, 538 F. Supp. 910 (S.D. Ind. 1982) (order granting preliminary injunction).

138. See Balz, *Texas Battle Rages Outside Prisons*, Washington Post, March 6, 1982, at A4, col. 1 (regarding *Ruiz v. Estelle*, 553 F. Supp. 567 (S.D. Tex. 1982)).

139. *Newman v. Alabama*, 683 F.2d 1312 (11th Cir. 1982).

140. See LAUGHLIN, *supra* note 106, at 4-5.

141. See *Texas Battle*, *supra* note 108, at A4, col. 1.

142. W. Reynolds, Remarks Before the National Governors Conference 6 (Feb. 21, 1982).

B. The Statutory Authority of the Special Litigation Section

The Special Litigation Section's authority derives from a hodgepodge of federal statutes. The Section has broad jurisdiction to enforce Titles II and III of the Civil Rights Act of 1964, which prohibit discrimination in public facilities and accommodations, section 504 of the Federal Rehabilitation Act of 1973,¹⁴³ the recent Civil Rights of Institutionalized Persons Act,¹⁴⁴ and Titles II through VII of the Civil Rights Act of 1968 (the Indian Civil Rights Act),¹⁴⁵ the Education of the Handicapped Act¹⁴⁶ and the Revenue Sharing Act,¹⁴⁷ where those statutes protect the rights of institutionalized persons. The bulk of the Section's resources have been devoted to rooting out widespread violations of the rights of persons institutionalized in state and local penal, mental health, and juvenile facilities.

The evolution of the Special Litigation Section reflects an increasing expansion of civil rights enforcement authority. This arm of the Civil Rights Division, once confined to routine cases of segregation in public places, is now the country's most significant protector of the rights of the nation's more than one million institutionalized persons. Its history of steady, forward-looking strides in civil rights enforcement and policy under both Republican and Democratic administrations is a model against which the actions of any new administration must be compared.

In 1978 two actions filed by the Special Litigation Section were dismissed on grounds that the United States had no statutory basis to sue.¹⁴⁸ These decisions effectively limited the Section's new activities to participation in cases independently initiated by private parties. Former Assistant Attorney General for Civil Rights, Drew S. Days, III, pressed for passage of the Institutionalized Persons Act, which authorized the Division to bring

143. 29 U.S.C. § 794 (1976 & Supp. V 1981). In the past the Section has also enforced federal regulations pertaining to discrimination on the basis of handicap. Since January 1981, the Section has filed only one compliance action, probably because other responsible agencies have failed to refer complaints to it.

144. 42 U.S.C. §§ 1997-1997j (Supp. V 1981).

145. 25 U.S.C. § 1301 (1976).

146. 20 U.S.C. § 1401 (1976 & Supp. V 1981).

147. 31 U.S.C. § 1242 (1976).

148. *United States v. Mattson*, No. 74-138 (D. Mont. Sept. 28, 1976), *aff'd*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 419 F. Supp. 358 (D. Md. 1976), *aff'd*, 563 F.2d 1121 (4th Cir. 1977).

litigation in its own right. The legislation took several years to pass, and the Section's ability to generate new activities remained limited. Finally, in May, 1980, the Civil Rights of Institutionalized Persons Act was passed, giving the Justice Department specific authority to take action in this area. In the waning days of the Carter Administration, the Section promptly began implementing its procedures by issuing three notices of intent to investigate conditions of confinement in correctional institutions,¹⁴⁹ and another regarding the adequacy of treatment provided in juvenile facilities in the Commonwealth of Puerto Rico.¹⁵⁰ It was against this background that the policies of the Reagan Administration took effect.

C. The Special Litigation Section Under the Reagan Administration

Despite Mr. Reynolds' expressed desire to scale down institutional litigation, he continues to protest publicly that "the commitment of this Administration to strong and vigorous enforcement of the many federal statutes," including the Institutionalized Persons Act, "is not . . . empty rhetoric."¹⁵¹ However, the Reagan Administration's actions to enforce the Act thus far do not support Mr. Reynolds' statement.

The Special Litigation Section does continue to pursue most cases filed during previous Administrations. At the same time, however, the Section has not aggressively pursued new cases; tactics in pending cases have been amended and some legal positions altered; the Section's clear emphasis has been on conciliation with state defendants; and, in at least two instances, the Department has laid the groundwork to oppose relief that it has supported in the past.

1. Freezing Civil Rights Enforcement

Mr. Reynolds has proudly reported that his Administration has "initiated sixteen investigations of allegedly egregious conditions" in correctional, nursing home, and mental health facili-

149. 1980 ATT'Y GEN. ANN. REP. 131.

150. *Santana v. Collazo*, Nos. 75-1187, 75-1213, 75-1466 (D.P.R. 1981).

151. W. Reynolds, Remarks Before the Delaware Bar Association 8 (Feb. 22, 1982).

ties.¹⁵² More relevant, however, is the fact that the Justice Department's March 10, 1982, motion to intervene in a sex-discrimination case against a Kentucky prison was the very first new enforcement action filed by the Section in fifteen months under the Reagan Administration.¹⁵³

The Section later intervened in a private suit, *Davis v. Henderson*, involving a Louisiana hospital for mentally ill offenders. The local U.S. Attorney, Stanley Bardwell, reportedly opposed the intervention, allegedly "lost" the signed copy of the legal papers he had been instructed to file, and then refused to sign the replacement copies. To Mr. Reynolds' credit, the suit was filed despite his opposition.

However, Mr. Reynolds and Attorney General Smith have rejected numerous other staff recommendations to initiate investigations, file suit or intervene. According to present and former Section staffers, Mr. Reynolds rejected staff recommendations to participate in litigation involving North Carolina facilities. In another case regarding a Virginia mental hospital, he declined to intervene on the basis that the state was conducting its own investigation. He refused to sue the Yuma, Arizona County Jail on the grounds that its conditions were "too bad."

Additionally, Mr. Reynolds' figures appear misleading. When questioned, attorneys within the Section could not substantiate the claim that sixteen investigations had been launched. They surmised that the statistic includes all investigations initiated since the enactment of the new statute in early 1980, which encompasses several begun prior to Mr. Reynold's arrival.

Early in his term, Mr. Reynolds circulated a memorandum to the staff that all decisions reflecting litigation tactics or policy, however small, must be approved by the Section's supervisory staff. Although this directive was purported to enable Mr. Reynolds to "familiarize himself" with the operation of the Sec-

152. *Id.*

153. *Canterino v. George Wilson*, C.A. No. C80-0545-L(J) (W.D. Ky.). Since March 10, 1982, one additional complaint has been filed, *USA v. Baylor University Medical Center*, C.A. No. 3-82-0453D. However, it is an extremely limited action against Baylor University to enforce regulations of the Department of Health and Human Services, and involves no substantial issues.

tion as he commenced his new duties,¹⁵⁴ the directive continues in effect today. As a result, Mr. Reynolds and his immediate subordinates review most pleadings, spending much of their working days editing and directing technical staff decisions. On May 27, 1981, Attorney General Smith further tightened controls over the independence of line attorneys to litigate prison cases by ordering that: "[t]he Civil Rights Division is directed to obtain the recommendation of the Bureau of Prisons in connection with all important pleadings in sufficient time to ensure their meaningful participation . . . This directive . . . applies to all pending cases as well as those not yet filed."¹⁵⁵

Encouraged by the obvious rift between the administration's policy-makers and the line staff, state defendants accused of constitutional abuses appear to feel free to seek protection from highly placed administration officials. In one such suit Mr. Reynolds personally negotiated directly with the state, bypassing the Section's staff attorneys who had worked on the case for several years.¹⁵⁶ In another well-publicized case involving the Mississippi prisons, the Special Litigation Section sought an order permitting federal agents to inspect county jails to ensure compliance with standards set by the court. Unbeknownst to the attorneys litigating the case, Deputy Attorney General Schmults, in private discussions with Mississippi Congressman Trent Lott, agreed to rely on an inspection by the State's own officials.¹⁵⁷ When the staff attorneys continued to investigate the state's compliance with the court order, Lott sought, though unsuccessfully, to have them discharged: "I want to know . . . why [a named staff attorney] has not been fired. There are too many lawyers ready and eager to carry out Ronald Reagan's policies to permit those policies to be subverted by mere civil servants."¹⁵⁸

154. Memorandum from William B. Reynolds to All Employees (Aug. 19, 1981).

155. Memorandum from William F. Smith to Giuliani, Jenson, Carson, and Turner (Mar. 27, 1981).

156. See text accompanying notes 160-62.

157. The Clarion Ledger, July 22, 1981, at 18A, col. 2-3.

158. Letter from Congressman T. Lott to Deputy Att'y Gen. Schmults (Oct. 21, 1981), quoted in LEADERSHIP CONFERENCE REPORT, *supra* note 69, at 73-74.

2. Deference to Defendants' Remedial Plans

A more tangible policy shift has been Mr. Reynolds' expressed, unambiguous desire to settle cases to the satisfaction of state defendants.¹⁵⁹ In *Ruiz v. Estelle*,¹⁶⁰ the largest prison case in which the Section is currently involved, Mr. Reynolds excluded Section attorneys and personally negotiated with state officials to reduce the relief ordered by the district court up to the moment that he himself argued the appeal before the Fifth Circuit.¹⁶¹ Mr. Reynolds has continued his attempts to settle *Ruiz*, excluding from the negotiations not only counsel for the plaintiffs on whose behalf the government originally intervened, but also the Section attorneys who have handled the case for the last four years. The net result was that the Division urged reversal, in part, of an order it had advocated in the lower court.¹⁶²

The Section has not been permitted to take positions on critical disputed issues in its cases. In one set of consolidated cases involving overcrowding in the Alabama prisons,¹⁶³ the district court several times found the state in non-compliance with its order.¹⁶⁴ Frustrated by the state's recalcitrance, the court ordered 352 prisoners released (later reduced to 290), and the state appealed. A staff attorney in the Special Litigation Section drafted an appellate brief supporting the district court's decree, but Mr. Reynolds ordered that the government take no position on appeal.

Perhaps the most blatant refusal to act involved allegations of racial segregation in a North Carolina prison. Section attorneys had negotiated with the prison officials to remedy the problem. When they recommended to Mr. Reynolds that a suit be initiated, his response was to meet personally with a lawyer for the state and allow an additional six months for it to remedy the violation. When that grace period ended, he chastised Section

159. W. Reynolds, Remarks Before the National Governors Conference (Feb. 21, 1982).

160. 679 F.2d 1115 (5th Cir. 1983).

161. *Id.* at 1125.

162. *Id.*, Brief of the United States, at 93, 127.

163. *Newman v. Alabama*, C.A. Nos. 3501-N, 74-57-N, 74-203-N (M.D. Ala.).

164. *Id.* See history recited in *Newman v. Alabama*, 466 F. Supp. 628 (M.D. Ala. 1979) and *Newman v. Alabama*, C.A. Nos. 3501-N, 74-57-N, 74-203-N (M.D. Ala.) (order of October 9, 1980 finding further non-compliance). See also *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd*, 559 F.2d 283 (5th Cir. 1979).

attorneys who reminded him that the deadline had passed. More than a year after suit was recommended, North Carolina has not corrected the problem and Mr. Reynolds has not approved any enforcement action.

3. Non-Litigation Policy Shifts

The Administration's intent to limit the Special Litigation Section's ability to oversee state compliance with acceptable prison standards is evident in non-litigative contexts as well. At the end of the Carter Administration, the Department issued and published comprehensive regulations that were required by the Institutionalized Persons Act,¹⁶⁵ setting forth minimum standards for inmate grievance procedures in state institutions and establishing a method for federal certification of the procedures.¹⁶⁶ Within two months of the rules' issuance, Attorney General Smith deferred their implementation.¹⁶⁷ Four months after that, the old rules were amended, without opportunity for public comment.¹⁶⁸ The new scheme limited inmate participation in grievances¹⁶⁹ (perhaps to a level below federal statutory requirements),¹⁷⁰ eliminated provisions for outside review of grievances concerning correctional policy,¹⁷¹ and removed requirements assuring the grievance procedures be fully explained to inmates and that inmates incapable of filing grievances receive necessary assistance and training.¹⁷² Despite these substantial changes, the committee that had worked on the initial regulation was not consulted before—or after—the final issuance of the amendments.

Similarly, on July 23, 1981, Attorney General Smith unilaterally withdrew the preamble to Federal Standards For Prisons and Jails, which the previous Administration had issued.¹⁷³ His

165. 42 U.S.C. § 1997e(b)(1) (1980).

166. Standards for Inmate Grievance Procedures, 28 C.F.R. § 40 (1982).

167. 46 Fed. Reg. 16,100 (1981).

168. 46 Fed. Reg. 36843, 36865-69 (1981).

169. Compare 46 Fed. Reg. 36866-68 (1981) with 46 Fed. Reg. 3845-47 (1981).

170. See 42 U.S.C. § 1997e(b)(2)(A). See also Letter of Edward I. Koren (ACLU National Prison Project) to Michael Pearlman (Federal Bureau of Prisons) (August 17, 1981).

171. Compare 46 Fed. Reg. 36867 (1981) with 46 Fed. Reg. 3846 (1981).

172. Compare 46 Fed. Reg. 36866-67 (1981) with 46 Fed. Reg. 3846 (1981).

173. U.S. DEPT. OF JUSTICE, FEDERAL STANDARDS FOR PRISONS AND JAILS (GPO De-

cursory statement emphasized that “[p]enal institutions are free to utilize these guidelines or not as they see fit” and that “[t]hese standards create no legally enforceable rights or expectations of any kind.”¹⁷⁴ He also noted, in the face of the newly enacted Institutionalized Persons Act, which explicitly imposed federal constitutional standards upon state institutions, that “in the event of violations of law, remedies must be imposed that afford *maximum discretion to a penal institution* to bring its conditions up to an acceptable environment . . .”¹⁷⁵

4. Policy Changes in Pending Litigation

Seeds of retrenchment of the Special Litigation Section’s attitudes have begun to sprout throughout its litigation. In the appeal from the district court decision in *Pennhurst State School & Hospital v. Halderman*, for example, Mr. Reynolds indicated that he intended to take a substantive position on the scope of the law that prohibits discrimination on the basis of handicap that would directly contradict the Special Litigation Section’s previous stance,¹⁷⁶ and that would substantially limit the scope of future cases involving the Act.¹⁷⁷

The most significant and distressing policy stance has come in reaction to the Supreme Court’s decision in *Youngberg v. Romeo*.¹⁷⁸ In *Romeo*, private plaintiffs urged the Supreme Court to declare a constitutional right to treatment for persons in state

cember 16, 1980).

174. U.S. Dept. of Justice, Change in Preamble of Federal Standards for Prisons and Jails, December 16, 1980 (July 23, 1981).

175. *Id.*

176. See, e.g., *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1978); Post-Trial Memorandum of the United States, App. No. 78-1490 (3d Cir.); Brief for the United States (filed October 14, 1981) at 40-41, 61. The appeal from the district court’s decision is part of a long history of litigation in this case. *Halderman v. Pennhurst State School & Hospital*, 446 F. Supp. 1295 (E.D. Pa. 1977), *aff’d in part and rev’d in part*, 612 F.2d 84 (3d Cir. 1979), *rev’d sub. nom.*, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), *on remand sub. nom.*, *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647 (3d Cir. 1982), *cert. granted sub. nom.*, *Pennhurst State School & Hospital v. Halderman*, 457 U.S. 1131 (1982).

177. See *Pennhurst State School & Hospital v. Halderman*, 612 F.2d 84 (3d Cir. 1979) (en banc), *rev’d sub. nom.*, *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), *on remand sub. nom.*, *Halderman v. Pennhurst State School & Hospital*, 673 F.2d 647 (3d Cir. 1982), *cert. granted sub. nom.*, *Pennhurst State School & Hospital v. Halderman*, 457 U.S. 1131 (1982).

178. 457 U.S. 307 (1982).

mental retardation institutions. The divided Court issued a narrow opinion, upholding such a right insofar as necessary to "ensure [residents'] safety and to facilitate [their] ability to function free from bodily restraints."¹⁷⁹ The Court noted, however, that "[i]n view of the kinds of treatment sought by respondent and the evidence of record, we need go no further in this case."¹⁸⁰ It thus expressly declined to reach the argument, made by the Justice Department in other cases, that inmates have a constitutional right to treatment, including the right to community placement where appropriate, psychiatric services, and special education.¹⁸¹

Shortly after *Romeo* was issued, Mr. Reynolds presented each of the Special Litigation Section's staff attorneys with a copy of a handwritten memorandum instructing them that, in his view, *Romeo* had ruled *against* a right to treatment beyond that necessary to assure an inmate's safety in his institution. He thus declared that henceforth the Section would no longer be permitted to rely on the due process theory to promote inmates' rights. This unduly restrictive reading of *Romeo*, if adhered to, would severely undercut the Section's position in most of the mental health litigation in which it is involved. Section attorneys have submitted a ten-page rebuttal of Mr. Reynolds' views, asking him to reconsider. On August 25, 1982, he decided not to change his position.

D. The Special Litigation Section—Which Way The Future?

It remains too early to evaluate the full course this Administration's institutional litigation will take. While the philosophy expressed by Mr. Reynolds lends credence to the expectation that significant retrenchment will occur in the area of civil rights for handicapped and institutionalized persons, the Administration has not yet been fully tested; the signs of change, discussed

179. *Id.* at 324.

180. *Id.* at 319.

181. The Supreme Court expressly left this issue open:

If, as seems the case, respondent seeks only training related to safety and freedom from restraints, this case does not present the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*. . . .

Id. at 318.

above, have still been relatively few.

Since the issuance of a critical report by the Leadership Conference on Civil Rights,¹⁸² feverish activity has been evident within the Section to bolster its claims of commitment to institutional litigation. A few new investigations have been commenced, and observers postulate that some new lawsuits may even be filed. Over the long haul, however, the crucial issue will not be the number of cases the Section institutes, but the legal positions it is ordered to take. It remains to be seen whether protestations of "commitment" to the Section's goals are, in fact, empty rhetoric or reality.

IV. FEDERAL ENFORCEMENT SECTION—DISCRIMINATION IN EMPLOYMENT

A. *Background and History of the Federal Enforcement Section*

The present Federal Enforcement Section of the Civil Rights Division was formed in 1979. It is the successor to the Division's Employment Section, which since 1969 had responsibility for the Division's equal employment opportunity activities.¹⁸³

The primary legal prohibition against employment discrimination is Title VII of the 1964 Civil Rights Act.¹⁸⁴ Until 1972, the Employment Section was the only federal office empowered to bring suit to enforce Title VII, because the Equal Employment Opportunity Commission ("EEOC") could seek only to conciliate complaints.¹⁸⁵ The 1972 amendments to Title VII, however, transferred to the EEOC concurrent authority to bring suit against private employers. Since 1974, when the EEOC's authority to sue became exclusive, the Division's jurisdiction has been limited primarily to systematic patterns and practices of employment discrimination by state and local governments, recipients of federal financial assistance, and federal government

182. LEADERSHIP CONFERENCE REPORT, *supra* note 69, at 73-74.

183. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 118 (1971); 1979 ATT'Y GEN. ANN. REP. 111.

184. 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V 1981).

185. UNITED STATES COMMISSION ON CIVIL RIGHTS, TO ELIMINATE EMPLOYMENT DISCRIMINATION: A SEQUEL 245-47 (1977) [hereinafter cited as 1977 CRC REPORT].

contractors.¹⁸⁶ These functions were performed in 1974-79 by the Employment Section and the litigation component of the Federal Programs Section. In 1979, these offices were merged into the newly created Federal Enforcement Section.

Over the years, the Division has built an admirable reputation as an opponent of employment discrimination. Equally important, the Division has helped to shape appropriate remedies for violations of the employment discrimination laws. As the Division itself noted, its arguments in *United States v. Local 53, Asbestos Workers*¹⁸⁷ "first established the principle that affirmative steps must be taken to correct the effects [of] past discriminatory employment practices."¹⁸⁸ The Division has similarly stated that "the landmark decisions sustaining the use of numerical goals and timetables as a remedy for past discrimination were either in cases brought by the Civil Rights Division . . . or in which the Division participated as amicus."¹⁸⁹ Cases involving such remedies as backpay and retroactive seniority have also been litigated successfully by the Division,¹⁹⁰ during both Republican and Democratic Administrations.

B. The Federal Enforcement Section Under the Reagan Administration

The Civil Rights Division under the Reagan administration has completely reversed its previous position concerning the appropriate relief in Title VII cases. Although the Division itself helped to establish the principle that affirmative actions, such as numerical goals and timetables, may be necessary in *some* cases to remedy employment discrimination, the Division has now stated that it will not advocate such remedies in *any* cases, even where an employer has engaged in a pattern or practice of discrimination.¹⁹¹ Assistant Attorney General Reynolds has an-

186. *Id.* at 247-52.

187. 407 F.2d 1047 (5th Cir. 1969).

188. 1977 CRC REPORT, *supra* note 185, at 277 n.76 (quoting a memorandum of the Chief of the Employment Section).

189. *Id.* See, e.g., *United States v. Local 86, Ironmakers*, 443 F.2d 544 (9th Cir. 1971).

190. See 1977 CRC REPORT, *supra* note 185, at 277 n.76.

191. *Employment Opportunity on Affirmative Action, 1981: Hearings Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 97th Cong., 1st Sess. 132, 139-41, 153-55 (1981) (statement of William Bradford Reynolds) [hereinafter cited as 1981 House Testimony]; W. Reynolds, Remarks Before

nounced that he will seek a test case to overturn the Supreme Court's decision upholding affirmative action plans in *United States Steelworkers v. Weber*.¹⁹²

1. Rejection of Affirmative Action in All Circumstances

Mr. Reynolds has stated that affirmative action remedies will be replaced by injunctions that prohibit discrimination, by increased emphasis on the recruitment of women and minorities, and by backpay and seniority awards to identified victims of discrimination. According to the Assistant Attorney General, Title VII should provide remedies only for those individuals who can be identified as victims of discrimination, and not for other members of their class. The ideological basis for the rejection of affirmative action in Title VII cases is the concept, often invoked by Attorney General Smith and Mr. Reynolds, that the Constitution is "color blind" and countenances no discrimination, not even to remedy past discriminatory practices.

This view is, of course, contrary to the Supreme Court's decision in the *Weber* case, and is tantamount to an announcement that the Civil Rights Division will not enforce the law of the land. In effect, Mr. Reynolds was virtually required to declare his intentions to seek reversal of *Weber*. Significantly, Mr. Reynolds claims no novel legal theory or newly discovered legislative history on which to argue his test case. Rather, it is based on his philosophical disagreement with the Court's decision. The Administration can accommodate this view because, as Mr. Reynolds has stated, it believes that "racial and other stereotyping is declining and most people now accept the legal and moral imperative to treat people equally . . ." ¹⁹³ In other words, as with school desegregation, the Administration has simply decided that employment discrimination is no longer a serious problem.

This virtual repudiation of bipartisan federal law is a dra-

35th National Conference on Labor 2, 3 (June 11, 1982).

192. W. Reynolds, Remarks Before Tenth Annual Conference of Executive Enterprises, Inc. 4 (Jan. 22, 1982) [hereinafter cited as Tenth Annual Conference]; *Civil Rights Division Head Will Seek Supreme Court Ban on Affirmative Action*, Wall Street Journal, Dec. 8, 1981, at 4, col. 2; see *United Steelworkers v. Weber*, 443 U.S. 1971 (1979).

193. W. Reynolds, Remarks Before the Conference on Equal Employment Opportunity in the Public Sector 3 (Feb. 1, 1982).

matic shift. For over twenty years, affirmative action has been a part of the federal government's strategy for combating discrimination. Since President Kennedy signed Executive Order 19025, the laws of Congress and the orders of the Executive have continued to encourage employers to take deliberate affirmative steps to bring about equal employment opportunity.¹⁹⁴ Indeed, in enacting Title VII, Congress gave the courts express authorization to use "affirmative action . . . or any other equitable relief as the court deems appropriate."¹⁹⁵ As the U.S. Commission on Civil Rights emphasized last year, affirmative action remains necessary to achieve meaningful success in combating the continuing problem of employment discrimination, Mr. Reynolds' personal views notwithstanding.¹⁹⁶

Instead of requesting affirmative hiring and promotion relief, the Division has announced that it will now seek to rely—almost exclusively—on recruitment programs to combat discrimination,¹⁹⁷ as exemplified by the consent decree in *United States v. Vermont*.¹⁹⁸ So long as an employer's pool of applicants includes women and minorities, according to this policy, sufficient affirmative remedial action has been taken without regard to the number that are actually hired.

Such an exclusive focus on recruitment practices is ineffective, impractical, and contrary to established case law. It is ineffective because it ignores discrimination in promotions, where the "applicant" pool is predetermined by the pre-existing work force, and because it allows an employer to continue to discriminate in actual hiring decisions so long as the pool of applications

194. See 26 Fed. Reg. 1977, 1959-63 Comp. 448; 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended by Exec. Order No. 11375, 32 Fed. Reg. 1430 (Oct. 13, 1967), 3 C.F.R. 406; 42 U.S.C. § 2000e note (1970), as amended by Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. See also *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 168-71 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).

195. 42 U.S.C. § 2000e-5(g). See *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173 n.47 (3d Cir. 1971).

196. U.S. COMMISSION ON CIVIL RIGHTS, AFFIRMATIVE ACTION IN THE 1980'S: DISMANTLING THE PROCESS OF DISCRIMINATION 1-7 (1981).

197. See Tenth Annual Conference, *supra* note 192, at 12; 1981 House Testimony, *supra* note 191, at 11; W. Reynolds, Remarks Before the Delaware Bar Association (Feb. 22, 1982).

198. No. 81-380 (D. Vt. 1981). Similar settlements have been or will be entered into in cases against state police forces in New Hampshire, Rhode Island, Massachusetts, Connecticut and Virginia.

from women and minorities is sufficient, even if none are hired. It is impractical because effective monitoring of compliance would require the Division to review detailed information on recruitment activities at a time when the Division's staff, and its inclination to monitor, is being reduced.¹⁹⁹ And it is contrary to established case law because it ignores the frequent holdings of the federal courts that affirmative remedies are permissible and indeed required in certain cases.²⁰⁰ As Justice Blackmun explained in the *Bakke* case, there is often "no other way" to "get beyond racism" than to "take account of race" in seeking to remedy entrenched patterns of discrimination.²⁰¹

In many employment discrimination cases, of course, affirmative hiring remedies are neither necessary nor appropriate. But for the Division to abandon them entirely, and not evaluate each situation on its individual merits, weakens its ability to negotiate, discourages voluntary affirmative action efforts and forecloses the possibility of meaningful relief in some cases. This retreat is further evidence to women and minorities that the Civil Rights Division is no longer their ally.

2. Discriminatory Job-Testing

The Division's retreat from the requirements of applicable case law and its own historical positions in employment discrimination litigation has not been limited to the area of affirmative action. In *Connecticut v. Teal*,²⁰² the Department of Justice joined the defendant, the State of Connecticut, in contending that a plaintiff should not be able to make out a *prima facie* case of employment discrimination by proving that a job test used by an employer operates to discriminate against minorities where, independent of the use of the allegedly discriminatory test, the employer has hired significant numbers of other minority employees.²⁰³ This position was taken although the Division itself, under both Republican and Democratic administrations, has supported and helped establish the well-recognized principle

199. See UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983 29-31 (June 1982).

200. See *id.* at 5-6.

201. *University of California v. Bakke*, 438 U.S. 265, 307 (1978).

202. 457 U.S. 440 (1982).

203. See *id.* at 442.

that the use of tests which discriminate against minorities constitutes a violation of Title VII.

Interestingly, the Department's argument in *Teal* contradicts not only its past positions, but also the position it has most recently taken concerning affirmative action. In the affirmative action area, as discussed above, the Division has argued that Title VII should be interpreted to provide remedies only for *individual* victims of employment discrimination, and that remedies directed at increasing the number of minority employees in an employer's work force are not justified. In *Teal*, however, as the Supreme Court specifically noted, the State of Connecticut and the Justice Department took the position that Title VII effectively granted an employer a "license to discriminate" against an "individual employee" on the grounds of race or sex "merely because [the employer] favorably treats other members of the employees' group."²⁰⁴ The only consistent principle which explains the Division's conflicting stance in these two areas is a simple one—when in doubt, favor the employer.

The Supreme Court's opinion in *Teal* draws attention to another interesting aspect of the Department's change in position, as reflected in its participation in that case. The Court specifically noted that the Government's brief in *Teal* was submitted by the Department of Justice, which "shares responsibility for federal enforcement of Title VII" with the Equal Employment Opportunity Commission. But the EEOC, the Court observed, "declined to join" the Department's brief.²⁰⁵

The Supreme Court rejected the position advocated by the Department in *Teal*. The Court held that in accordance with the long-standing decision in *Griggs v. Duke Power Co.*,²⁰⁶ a test which operates to discriminate against minorities and which cannot be shown to be "job-related," violates Title VII, regardless of whether the employer has "favorably treated" other members of the minority group.²⁰⁷ The Justice Department's arguments to the contrary, the Court noted, would have created a "special haven for discriminatory test," in violation of Title

204. *Id.* at 455.

205. *Id.* at 451 n.11.

206. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

207. *Connecticut v. Teal*, 457 U.S. 440, 454 (1982).

VII.²⁰⁸ The unequivocal rejection by the Supreme Court of the Division's position in *Teal* provides further evidence that the Division has abandoned vigorous enforcement of Title VII.

V. COORDINATION AND REVIEW SECTION—DISCRIMINATION IN
FEDERALLY FUNDED PROGRAMS

A. *Introduction*

The most important non-litigation function of the Civil Rights Division is performed by the Coordination and Review Section. This Section was created during the Carter Administration, as the Sex Discrimination Task Force, to review federal statutes and regulations for sex bias. After an internal reorganization, the Task Force became the Office of Coordination and Review, which was assigned responsibility for government-wide coordination of Title VII enforcement by the Attorney General. The Office was elevated to the status of a Section in 1980 and now, under Executive Order 12250 (Nov. 2, 1980), it is responsible for the government-wide coordination of all federal government activities to prevent discrimination in federal programs or programs benefiting from federal assistance on the basis of race, national origin, sex, or handicap.²⁰⁹ The Section is not responsible for age or political discrimination, nor does it engage in litigation.

The Section is intended to be the federal government's primary civil rights coordinator—the manifestation of the Division's symbolic role of advocate for minorities and handicapped persons with federal agencies. Significantly, the Section's activities for the first twenty months of the Reagan Administration indicate a virtual abdication of this role.

B. *Failure to Publish Minimum Guidelines*

The 1980 Executive Order 12250 intended to eliminate inconsistent federal civil rights rules by requiring the Civil Rights Division to promulgate minimum standards for all agencies to adopt. This, it was believed, would promote fair and uniform regulations and relieve some of the complex burdens federal

208. *Id.* at 452.

209. *See* 45 Fed. Reg. 72995 (1980).

agencies faced in attempting to comply with the sophisticated civil rights laws. President Reagan has not rescinded or modified that Order, and it remains in full force.

Nevertheless, in its first twenty months the Section has failed even to publish proposed minimum guidelines. Federal agencies continue to submit for prior review their own internally developed regulations, and the Section's personnel continue to sift through them on a case-by-case basis. This omission has been caused, in some measure, by an insufficient allocation of resources to the Section.²¹⁰ This staff shortage, according to the U.S. Commission on Civil Rights, also impedes the Section's ability to review thoroughly the proposed regulations it does receive, and prevents meaningful monitoring and evaluation activities to determine if agencies are actually following their own rules.²¹¹

C. Draft Regulations for Enforcement of Discrimination Laws

The Section's primary regulatory activity during its first twenty months, aside from reviewing individual agency proposals, has been to draft about one-half of the required minimum standards, although none have even been proposed for adoption. One portion of these drafts involves the procedural mechanisms that agencies must follow in promulgating and determining violations of their rules.

1. Monitoring Compliance

At the insistence of the Office of Management and Budget (OMB), the initial draft of the coordinating regulations for the procedures that federal agencies must follow in monitoring their grants was intended to reduce the regulatory burden upon the recipients of federal financial assistance. The Division sought to accomplish this goal in three important ways.

First, the new draft regulations simply redefine, in a more narrow fashion, the term "recipient." Second, the draft regulations would limit the ability of federal agencies to require recipi-

210. UNITED STATES COMMISSION ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983*, 31, 38-39 (1982).

211. *Id.* at 39.

ents to provide them with detailed information concerning civil rights compliance. Third, the draft regulations limit the agencies' ability to conduct compliance reviews.

The thrust of these changes is clear. Under the guise of removing "undue" regulatory burdens, the Administration is relaxing enforcement of the civil rights laws. In the overall scheme of things, enforcement of those laws is simply not a priority matter.

2. Rights of Handicapped Persons

The only substantive regulation currently in draft form concerns the provisions for enforcing prohibitions against discrimination on the basis of handicap. According to some Section personnel, these regulations were selected first because the Administration believed that handicapped persons were fewer or less well-organized than women and racial minorities, thus making easier the task of cutting back the level of civil rights protections currently available. Once these changes were adopted and in place, they would provide a model and a precedent for similar changes in sex and race regulations.

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of handicap by federal executive agencies and by programs or activities that receive federal financial assistance.²¹² This statute is the major piece of civil rights legislation for disabled people, and demonstrated Congress' strong commitment to ending discrimination based upon handicap.

The Department of Health, Education and Welfare was initially designated as the lead agency for coordination of consistent, government-wide enforcement of section 504, under Executive Order 11914 (April 28, 1976).²¹³ After extensive nationwide pressure from disability groups, HEW published guidelines for implementing section 504 on January 13, 1978.²¹⁴ These guidelines set forth enforcement procedures, standards for determining which persons are handicapped, and general guidelines for determining what practices are discriminatory. Each federal agency that provides federal financial assistance is required to

212. 29 U.S.C. § 794 (1976 & Supp. V 1981).

213. 41 Fed. Reg. 17871 (1980).

214. 45 C.F.R. § 84.1-84.61 (1982).

use the HEW guidelines as a model for its own regulations implementing section 504 and a number of federal agencies have published proposed or final regulations intended to implement section 504.

Responsibility for coordinating the implementation and enforcement of section 504 was, as noted above, transferred to the Department of Justice in 1980 by Executive Order 12250. Under this Order, the Department must assure that all federal agencies which provide financial assistance have regulations and enforcement procedures which are consistent with the Department's coordination guidelines. The existing HEW guidelines will continue in force until they have been revoked or modified by the Department.

Draft coordination guidelines, dated January 27, 1982, were distributed for comment to federal agencies which provide federal financial assistance, but no official rules have yet been promulgated.

A version of the regulations prepared in January, 1982, demonstrates that the Division is attempting to substantially erode existing protections for the civil rights of disabled individuals. Although there have been several revisions of various sections, this draft remains the most "official" version pending distribution of any modifications. Current 504 regulations protect disabled people against discrimination in employment, education, physical accessibility, and many programs and services. The proposed Department draft weakens many of these protections, and will create uncertain and piecemeal enforcement in others. In particular, the draft regulations would produce drastic changes in four areas: general equal opportunity standards, "program specific" coverage, elementary and secondary education, and post-secondary education.

D. Suspension of Mass Transit Regulations

The bulk of the Coordination and Review Section's activities involve the review of regulations submitted by other federal agencies for the purpose of determining their compliance with the government-wide minimum standards. In the case of section 504 protections for handicapped persons, this means the old HEW regulations would remain in effect until the Division actually promulgates new ones.

Despite this obligation, the Section has, on several occasions, approved agency regulations that more closely reflect the draft proposals not yet adopted than the existing regulations. In fact, the mass transportation regulations of the HEW guidelines have been suspended for more than a year, so that minimum standards no longer exist in that area.

1. The Department of Transportation Rules

On July 20, 1981, the Department of Transportation (DOT) issued a final interim rule, without notice or public comment, revoking requirements that federally assisted transportation systems make certain types of access available to handicapped patrons. There was little doubt that the rule was in direct contravention of the existing section 504 guidelines, but rather than refusing to approve it the Justice Department summarily suspended the applicable guidelines—*three weeks after* DOT had already published its rule.²¹⁵ The notice stated that the rule suspension was necessary to “ensure that the DOT’s rule is not inconsistent with the coordination guidelines issued by the Department of Justice”²¹⁶

2. Civil Aeronautics Board Rules

In June, 1982, the CAB published its final rules with regard to nondiscrimination on the basis of handicap, designed to assure that handicapped individuals have access to air transportation services.²¹⁷ A major concern of handicapped persons was the limited accessibility of most aircraft, such as narrow aisles and small seats, and they requested the CAB to require, consistent with HEW guidelines, that airlines make limited structural modifications to accommodate them.

The CAB, however, relying on Justice’s suspension of the mass transportation regulations nearly a year earlier, noted that it was “free to adopt” its own standards and rejected the need for any modifications.²¹⁸ Presumably, Justice had, pursuant to Executive Order 12250, reviewed and approved the regulations

215. 46 Fed. Reg. 40687 (1981).

216. *Id.*

217. 47 Fed. Reg. 25936 (1982).

218. *Id.* at 25940.

prior to their publication.

It is of no little significance that an entire portion of the extant regulations were simply suspended more than a year ago. No interim rules have been promulgated, and the final rules, as noted above, have not even been published in a proposed form for public review and comment. Under Mr. Reynolds' direction, the Division has simply ignored its responsibilities to coordinate implementation of federal laws and regulations.

VI. THE CRIMINAL SECTION—CRIMINAL VIOLATION OF CIVIL RIGHTS STATUTES

The Criminal Section of the Civil Rights Division has authority to prosecute violations of a variety of federal civil rights statutes that provide for criminal sanctions. By far the largest number of cases involve misconduct by law enforcement officers (e.g., police, correctional officers, and INS officers) and include instances of brutality, harassment, witness intimidation, and perjury, among others. These cases are brought primarily under 18 U.S.C. §§ 241 and 242.

Among the non-law enforcement prosecutions concluded by the Section are cases dealing with racially motivated acts of violence, including Ku Klux Klan activity, brought primarily under 18 U.S.C. § 245(b)(2); racially motivated interference with housing rights, brought under 42 U.S.C. § 3631; and involuntary servitude, brought under 42 U.S.C. §§ 1581 and 1583. In addition, the Justice Department has the authority to enforce a variety of little-used criminal statutes, including 18 U.S.C. § 2191, which prohibits cruelty to seamen and was invoked recently for the first time in 80 years.

According to Assistant Attorney General Reynolds, the number of criminal prosecutions brought by the Justice Department under the civil rights acts is equal to or greater than the number brought by the Department under the Carter and Ford administrations during comparable periods of time. In his February 22, 1982 address to the Delaware Bar Association, Mr. Reynolds cited, as the first example of the civil rights enforcement efforts of the Reagan Administration, the record of the Criminal Section. He stated that between January 29, 1981, and February 22, 1982, the Section had "filed 43 new cases charging criminal violations of the civil rights laws and had conducted tri-

als in 11 other cases that were previously under indictment.”²¹⁹ According to Reynolds, “this level of activity exceeds the ‘track record’ of prior administrations.”²²⁰ Interviews with the Chief of the Criminal Section and others confirm these figures.

Traditionally, the most controversial and unpopular Criminal Section prosecutions are those brought against law enforcement officials. Yet these cases generally have been approved by Assistant Attorney General Reynolds. For example, in the last year the Section has brought cases against five INS officers at Ft. Chaffee, Arkansas, who were charged with beating Cuban refugees. It has prosecuted a member of the Border Patrol for sexually molesting Mexican immigrants. It prosecuted the police chief in Tyler, Texas, for “setting up” defendants on drug charges and it has prosecuted a New Orleans homicide detective for brutality after a defendant died during interrogation.

The Administration has not yet had to confront two issues that could test its commitment to vigorous enforcement. The first is the so-called “dual prosecution” situation, where law enforcement officers are accused of acts that may violate both federal civil rights laws and state criminal law. In previous administrations the policy was to grant priority to the state prosecution unless there was some “compelling federal interest” in proceeding in a particular case. If the state declined to prosecute or prosecuted ineffectively, or if the officers were acquitted, the Civil Rights Division was then authorized to proceed. In view of the Administration’s “states’ rights” philosophy, however, it remains to be seen whether such cases, particularly those with high visibility, will continue to be prosecuted at the federal level.

The second issue, somewhat related to the “dual prosecution” problem, involves conflicts between Civil Rights Division attorneys and local U.S. Attorneys. U.S. Attorneys are political appointees, whose views are, presumably, consonant with the Administration’s. Their decisions about which civil rights cases

219. W. Reynolds, Remarks Before the Delaware Bar Association 6 (Feb. 22, 1982). The significance of the January 29, 1981 date is somewhat obscure and was, perhaps, an error since the Reagan Administration took office on January 20, 1982 rather than January 29. In fact, between January 29, 1981 and February 22, 1982 forty new cases were filed; the remaining three cases cited by Reynolds were filed between January 20 and January 29, 1981.

220. *Id.*

to prosecute in their locales may well be at fundamental odds with the views of the career lawyers in the Division. How those differences are resolved will be a telling factor in the Administration's ultimate record.

Despite speculation about what might happen in the future, statistically it does appear that the Justice Department is doing more civil rights enforcement in criminal cases than it did in the past. Statistics can, of course, be misleading and this Administration, not unlike others, may be manipulating numbers to make them say what the Administration wishes them to say. Attempts have apparently been made to re-characterize cases brought under the Carter Administration to make it appear that relatively fewer civil rights prosecutions were initiated during that time. On the other hand, many of the cases brought by U.S. Attorneys' offices which the current Administration includes in its total may include one or more counts under the civil rights statutes that are not necessarily true "civil rights" cases. Prosecutions of witness intimidation, for example, may have more to do with issues of criminal justice administration than with civil rights. To some extent, therefore, official statistics may be unreliable and it may be futile to try to compare statistics from one year to another. Nevertheless, there is general agreement among those individuals we interviewed that the Justice Department has initiated at least as many and perhaps more criminal rights prosecutions under the Reagan Administration than under previous administrations, and that, to date, there has been no overt attempt to interfere inappropriately with the work of the Criminal Section.

There are several explanations for this result. Preliminarily, it must be remembered that, unlike any other section in the Division, Criminal is *reactive*, not *proactive*. It responds to complaints, and depends upon the FBI to investigate the underlying allegations. Thus, as complaints increase and FBI field work in civil rights matters improves, the Section's level of activity is likely to achieve a corresponding increase. According to interviews with present and former Section officials, the current increase is attributable more to a combination of improved FBI work, random chance, and an increase in racial violence than to any initiative in the Section.

But there are also other reasons of policy behind the Crimi-

nal Section's relatively high level of activity. On a theoretical level, this Administration believes that widespread racism is a thing of the past. As a result, isolated intentional acts of discrimination are viewed as aberrations that deserve to be punished.

As a practical matter, these cases generally involve isolated actions by single individuals or small groups, and thus do not threaten any influential constituencies. If the Section were to attempt, for example, to bring peonage prosecutions against large landowners, or to try to prosecute police unions or to bring another affirmative *Philadelphia*-type suit, support for its activities could likely evaporate.

Finally, the remedies sought in these cases are fully consistent with this Administration's philosophical view of the judiciary's role. They are "one-shot" prosecutions of alleged wrongdoers who are convicted and punished, or acquitted. They do not involve the courts or the Justice Department in the long-term supervision of the criminal justice system or any other institutions which, the current Division leadership believes, should be free from federal intrusion.

Given these circumstances, it is no surprise that Assistant Attorney General Reynolds has chosen to highlight the Criminal Section as the centerpiece of his civil rights activities. A recent report by the United States Commission on Civil Rights, however, provides a disturbing warning. The Commission reported in June, 1982 that the Section faces "growing problems in existing areas of its jurisdiction," including "increased Ku Klux Klan activity," and "widespread violations it believes certain groups are suffering," which it has not had the resources to investigate.²²¹ Nevertheless, the Justice Department's proposed Fiscal Year 1983 budget would cut the staff and other resources available to the Criminal Section, preventing it from making "a major effort against these violations in FY 1983."²²²

221. UNITED STATES COMMISSION ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT BUDGET: FISCAL YEAR 1983 at 30 n.88, 36 (1982). These widespread problems include harassment and discrimination against Hispanics in the Southwest and migrant workers subject to illegal peonage.

222. *Id.* at 30 n.88, 36.

